No. 08-908 917 JAN 23 2009

Supreme Court of the United States

ROSEMARIE MCSWAIN,
Petitioner,

v.

SUSAN DAVIS, WARDEN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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January 23, 2009

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QUESTION PRESENTED

Whether, in order to be entitled to an evidentiary hearing to determine if a habeas petitioner's mental illness prevented her from meeting the one-year limitations period instituted by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d), it is sufficient that a habeas petitioner demonstrates the existence of such a mental condition, as the Third and Ninth Circuits have held, or whether a petitioner must also meet additional pleading and evidentiary requirements, as the Sixth Circuit held below?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Sixth Circuit and in this Court are Petitioner Rosemarie McSwain and Respondent Susan Davis, the Warden of Huron Valley Complex (Women's), where Petitioner is incarcerated.

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INTRODUCTION

The Sixth Circuit's decision below denying Petitioner an evidentiary hearing to establish that her mental illness prevented her from meeting the one-year limitations period of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d), is in direct conflict with decisions from the Third and Ninth Circuits holding that an evidentiary hearing is required when, without more, a habeas petitioner makes a good faith claim of a mental illness. The courts of appeals thus are divided over an important and recurring issue in the law of federal habeas corpus that affects innumerable litigants each year. In light of Congress's instruction "that this Court, and not the lower courts, should provide the final answer to questions of interpretation arising under" AEDPA, *Dodd v. United States*, 545 U.S. 353, 365 n.4 (2005), review by this Court is warranted.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit affirming the dismissal of Petitioner's habeas petition as untimely (Pet. App. 1a-26a) is available at 287 F. App'x 450 (6th Cir. July 15, 2008). The Sixth Circuit's order denying Petitioner's timely petition for a rehearing *en banc* (Pet. App. 114a) is not reported. The decision of the United States District Court for the Eastern District of Michigan dismissing Petitioner's habeas petition as untimely (Pet. App. 31a-39a) is unpublished. The decision of the Michigan Supreme Court denying Ms. McSwain's post-conviction challenge (Pet. App. 41a) is available at *People v. McSwain*, 688 N.W.2d 499

(Mich. 2004). The order of the Michigan Supreme Court denying Ms. McSwain's direct appeal (Pet. App. 105a) is available at *People v. McSwain*, 437 Mich. 1029 (1991).

JURISDICTION

The court of appeals issued its decision on July 15, 2008. On July 29, 2008 Petitioner filed a timely petition for rehearing and rehearing *en banc*, which was denied on October 30, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2244(d) provides:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme

> Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

STATEMENT

Petitioner Rosemarie McSwain presented "substantial evidence to support [her] assertion that she suffers from a mental illness" known as Dissociative Identity Disorder ("DID"), Pet. App. 12a. She seeks review of the decision of the United States Court of Appeals for the Sixth Circuit upholding the denial of her request for an evidentiary hearing to determine if her mental disease prevented her from meeting the one-year limitations period under AEDPA.

In 1988, Ms. McSwain was convicted of first-degree murder and felony firearm possession and sentenced to a mandatory life sentence. Pet. App. 1a-2a. After the Michigan Court of Appeals affirmed her conviction, Pet. App. 106a-113a, the Michigan Supreme Court denied leave to appeal. Pet. App. 105a.

On February 5, 1998, Dr. Steven R. Miller, a licensed psychologist and certified forensic examiner, diagnosed Ms. McSwain with DID, which confirmed an earlier diagnosis by Leslie K. Pielack, M.A., a certified social worker and licensed professional counselor. Pet. App. 8a-9a. The American Psychiatric Association ("APA") classifies DID,

formerly known as multiple personality disorder, "as a dissociative disorder." Pet. App. 8a, 48a (citing APA, *Diagnostic and Statistical Manual of Mental Disorders* (3rd ed. 1987)). "DID is extremely rare," Pet. App. 63a, 102a, and "is characterized by [t]he presence of two [or] more distinct identities or personality states that recurrently take control of the individual's behavior accompanied by an inability to recall important personal information that is too extensive to be explained by ordinary forgetfulness." Pet. App. 48a (citing APA, *Diagnostic and Statistical Manual of Mental Disorders* 477 (4th ed. 1994)).

Based on the new diagnosis, Ms. McSwain sought state habeas corpus relief in August 1998, arguing that she was mentally incompetent at both the time of her trial and the offense, and that information regarding her mental illness was not available or discoverable during her trial or her appeal. Pet. App. 45a-46a. The Michigan habeas court held a two-day evidentiary hearing on Ms. McSwain's motion for post-conviction relief. During the hearing, three mental health experts testified that Ms. McSwain's condition was "among the most severe" cases of DID "they had ever observed." Pet. App. 103a. All three experts agreed that Ms. McSwain suffered from DID not only at the time of their examinations, but also that she "suffered from DID from childhood on, including at the time of the offense." Pet. App. 96a.

On August 21, 2001, the Michigan habeas court granted Ms. McSwain's motion for a new trial, concluding that she "presented a compelling case that she had and continues to have several distinct personalities." Pet. App. 101a. But without

questioning Ms. McSwain's "current mental condition," the Michigan intermediate court reversed because "there was no direct evidence on which the trial court could have" determined that McSwain suffered from DID at the time of trial. Pet. App. 83a. The Michigan Supreme Court denied Ms. McSwain's application for leave to appeal on September 16, 2004. Pet. App. 41a.

On September 14, 2005, Ms. McSwain filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Michigan. Pet. App. 120a. She asserted in her habeas petition that she was "incompetent" at the time of her trial and sentence "due to [DID], in violation of her federal and state constitutional rights to due process and assistance of counsel." Pet. App. 122a-123a. Respondent Susan Davis, as Warden for Michigan's Huron Valley Complex ("Women's"), moved to dismiss Ms. McSwain's petition as time-barred under the one-year limitations period of 28 U.S.C. § 2244(d). In response to the State's motion to dismiss, Ms. McSwain filed a response in which she sought equitable tolling of the statute of limitations, appointment of counsel, and an evidentiary hearing. Pet. App. 133a-235a. The district court granted the motion to dismiss Ms. McSwain's petition as time-barred. Pet. App. 31a-39a.

Ms. McSwain appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed. Pet App. 1a. The panel assumed that Ms. McSwain's "DID diagnosis is newly discovered evidence," and "that the earliest date on which McSwain could have reasonably discovered the

mental illness that forms the factual predicate of her habeas claim was February 5, 1998." Pet. App. 8a-9a. Reasoning that the "one-year limitations period [of AEDPA] started on February 5, 1998," the court determined that the period "had run for over six months before it was tolled by the filing of McSwain's state post-conviction proceedings on August 13, 1998." Pet. App. 9a. Since Ms. McSwain filed her federal habeas petition on September 15, 2005, more than "six months from the conclusion of her state post conviction proceedings on September 16, 2004," the panel concluded that "her petition was untimely." *Id.*

The panel rejected Ms. McSwain's request for equitable tolling of the one-year limitation period on account of her mental illness, explaining that "[i]n order to be entitled to equitable tolling the petitioner must make a threshold showing of incompetence and must also demonstrate that the alleged incompetence affected her ability to file a timely habeas petition." Pet. App. 12a (citation omitted). The panel acknowledged that "[t]he record contains substantial evidence to support McSwain's assertion that she suffers from a mental illness." *Id.* However, in the appeals court's view, the record was not sufficient "to support a causal connection between [Ms. McSwain's] mental illness and her ability to file a timely habeas petition" when Ms. "McSwain was able to pursue both direct and collateral challenges to her convictions in the state courts notwithstanding her mental illness," and Ms. "McSwain has not alleged any facts that would suggest that her mental illness prevented her from timely filing her habeas petition." Pet. App. 12a-13a.

In the alternative, Ms. McSwain sought "an evidentiary hearing on the issue of whether her mental illness prevented her from timely filing her habeas petition." Pet. App. 14a. This request was also rejected. The panel acknowledged decisions from the Third and Ninth Circuits that had "remanded for an evidentiary hearing on equitable tolling where the record contained evidence of mental illness but no evidence that the mental illness affected the petitioner's ability to present his or her habeas petition." *Id.* (citing *Laws v. Lamarque*, 351 F.3d 919, 924-25 (9th Cir. 2003); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001), *reversed in part on other grounds by Carey v. Saffold*, 536 U.S. 214 (2002)). The court, however, distinguished these rulings on the ground that Ms. McSwain did not assert that she was prevented from timely filing her habeas petition "because of her mental illness." Pet. App. 15a. Rather, "[s]he merely indicated that because she has been suffering from DID since childhood, she likely suffers periods of incompetency which would effect her ability to file a timely habeas petition," but had "not alleged any facts, which, if true, would show that her mental illness prevented her from timely filing her habeas petition once she became aware of her DID diagnosis." *Id.*

Ms. McSwain timely filed a petition for rehearing and rehearing *en banc* before the Sixth Circuit, which was denied on October 30, 2008. Pet. App. 114a.

REASONS FOR GRANTING THE WRIT

THE SIXTH CIRCUIT'S DENIAL OF AN EVIDENTIARY HEARING TO ESTABLISH WHETHER PETITIONER'S MENTAL ILLNESS PREVENTED HER FROM MEETING THE AEDPA LIMITATIONS PERIOD IS IN DIRECT CONFLICT WITH RULINGS FROM THE THIRD AND NINTH CIRCUITS

AEDPA provides a one-year period in which a prisoner can file a federal habeas petition following a state court conviction. This deadline extends, *inter alia*, from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). Because the Sixth Circuit assumed that Petitioner's mental condition could have been discovered nearly six months prior to the filing of her state post-conviction proceedings, and nearly a year passed between the end of those proceedings and the filing of her federal habeas petition, the total time exceeded this one-year period, unless, as Petitioner asserted, AEDPA's non-jurisdictional limitations period was equitably tolled by her mental illness. *Souter v. Jones*, 395 F.3d 577, 588 (6th Cir. 2005) ("'[b]ecause AEDPA's one-year statute of limitations is not jurisdictional, a petitioner who misses the deadline may still maintain a viable habeas action if the court decides that equitable tolling is appropriate'" (quoting *Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004))). The federal courts of appeals are in agreement that the AEDPA limitations period is subject to equitable tolling where an "extraordinary circumstance" prevented a petitioner from timely filing her habeas

petition.[1] They are also in agreement that "the mental incapacity of the petitioner can warrant the equitable tolling of the statute of limitations," and that the habeas petitioner must demonstrate that she suffers from a mental defect during the relevant time period to be eligible for such tolling. Pet. App. 12a.[2]

Where the courts of appeals disagree is over what sort of showing or allegation must be made to obtain an evidentiary hearing to determine whether the habeas petitioner's mental illness prevented him or her from meeting the AEDPA limitations period.

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[1] While this Court has "not decided whether § 2244(d) allows for equitable tolling," *Lawrence v. Florida*, 549 U.S. 327, 336 (2007), the courts of appeals have unanimously ruled that the AEDPA one-year limitations period is subject to equitable tolling for extraordinary circumstances. *See Trapp v. Spencer*, 479 F.3d 53, 59 (1st Cir. 2007); *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000); *Miller v. N.J. State Dept. of Corr.*, 145 F.3d 616, 618 (3d Cir. 1998); *United States v. Prescott*, 221 F.3d 686, 688 (4th Cir. 2000); *Baker v. Cain*, No. 06-31177, 2008 WL 3243993, at *2 (5th Cir. Aug. 7, 2008); *In re McDonald*, 514 F.3d 539, 543 (6th Cir. 2008); *Keenan v. Bagley*, 400 F.3d 417, 420-21 (6th Cir. 2005); *Johnson v. Chandler*, 224 F. App'x 515, 518 (7th Cir. 2007); *Bishop v. Dormire*, 526 F.3d 382, 384-85 (8th Cir. 2008); *Brown v. Attorney Gen.*, 291 F. App'x 15, 16 (9th Cir. 2008); *Herdocia v. Howard*, 275 F. App'x 774, 776 (10th Cir. 2008); *Holland v. Florida*, 539 F.3d 1334, 1338 (11th Cir. 2008). The Court may, of course, address the subsidiary question of the availability of equitable tolling for extraordinary circumstances under AEDPA in addition to answering the question presented. SUP. CT. R. 14(a).

[2] *See also Laws v. Lamarque*, 351 F.3d 919 (9th Cir. 2003); *Nowak v. Yukins*, 46 F. App'x 257 (6th Cir. 2002); *Nara v. Frank*, 264 F.3d 310 (3d Cir. 2001); *Lake v. Arnold*, 232 F.3d 360 (3d Cir. 2000).

The court below ruled that the habeas petitioner must, at the very least, present "a sufficient factual basis," in addition to a specific pleading, that her mental condition caused her untimely filing to warrant such a hearing. Pet. App. 16a. By contrast, the Third and Ninth Circuits require an evidentiary hearing whenever the habeas petitioner makes a good faith showing of a mental disease—without imposing any special pleading or proof burdens as to causation. *Laws*, 351 F.3d at 924-25; *Nara*, 264 F.3d at 310. The Sixth Circuit's decision to deny Petitioner an opportunity to establish that her dissociative condition presents an extraordinary circumstance which prevented her from filing a timely habeas petition is thus plainly in conflict with established precedent in at least two other Circuits.

In *Nara v. Frank*, 264 F.3d 310 (3d Cir. 2001), *reversed in part on other grounds by Carey v. Saffold*, 536 U.S. 214 (2002), the Third Circuit considered an appeal from the dismissal of a habeas petition on grounds of untimeliness under § 2244(d). The petitioner, Joseph Nara, sought to have his original guilty plea withdrawn on the grounds that he was not mentally competent to enter the plea at the time, *id.* at 311-12—a situation similar to that of Petitioner here, who asserts that she, too, was incompetent to stand trial. Pet. App. 2a. After a series of state post-conviction proceedings, Nara filed a habeas petition in a federal district court. When the State sought to have his petition dismissed as untimely, Nara argued that "his mental health problems are extraordinary circumstances" which justify equitable tolling. *Nara*, 264 F.3d at 320. The district court adopted the Magistrate Judge's recommendation to dismiss the

petition as untimely without further inquiry into Nara's mental state.

On appeal, the Third Circuit in *Nara* reversed, holding that because the petitioner "presented evidence of ongoing, if not consecutive, periods of mental incompetency, an evidentiary hearing is warranted in order to develop the record." *Id.* Though—like the Sixth Circuit here—the Third Circuit recognized that "the alleged mental incompetence must somehow have affected the petitioner's ability to file a timely habeas petition," *id.*, the court held that Nara's allegations of an ongoing mental illness "may constitute extraordinary circumstances to justify equitable tolling," and remanded the case for further inquiry by the district court. *Id.* The appeals court emphasized that Nara was entitled to such a hearing despite the fact that "there was no evidence in the record that Nara's current mental status affected his ability to present his habeas petition." *Id.*[3]

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[3] Subsequent applications of *Nara* within the Third Circuit reaffirm its holding that a habeas petitioner need only advance evidence of his or her mental illness to be entitled to a hearing to establish whether the mental condition prevented compliance with the AEDPA limitations period. For example, in *Graham v. Kyler*, No. 01-1997, 2002 WL 32149019 (E.D. Pa. Oct. 31, 2002), the district court considered a report and recommendation from a Magistrate Judge that the petitioner's habeas petition be rejected as untimely. Citing *Nara*, the habeas court rejected the recommendation as deficient, and—based on a submitted report by the petitioner's psychologist—held its own evidentiary hearing to determine whether the petitioner "was mentally incompetent, and if so, whether this affected his ability to file a timely habeas petition." *Id.* at *1; *accord, Wilson v. Stickman*,

Similarly, in *Laws v. Lamarque*, 351 F.3d 919 (9th Cir. 2003), the Ninth Circuit mandated an evidentiary hearing in the case of a habeas petitioner, Brian Laws, who attached medical records to his habeas petition but made no attempt to establish that his mental condition made it "impossible" to file a timely petition. *Id.* at 922. Like Petitioner here, Laws filed his habeas petition within one year of denial of state post-conviction review, but failed to account for the passage of time between direct and post-conviction review. Despite Laws' proof of his mental condition and claim that his condition "precluded his timely filing," the magistrate judge found that Laws' application was untimely, and the district court adopted the recommended dismissal. *Id.*

The Ninth Circuit, however, reversed. The appellate court held that a habeas petitioner is not

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Nos. 03-953, 03-699, 2005 WL 1712385, at *1-2 (E.D. Pa. July 21, 2005) (accepting recommendations based on an evidentiary hearing held before the Magistrate Judge). Given the benefit of a fully developed record, the district court in *Graham* was able to conclude that the "petitioner's inability to engage in the abstract reasoning necessary to understand basic legal concepts, combined with his diagnosed psychiatric disorders and obvious functional illiteracy would have made it impossible for him to file or to seek assistance in filing a habeas petition . . . ." *Graham*, 2002 WL 32149019, at *10. At no time prior to the evidentiary hearings did the petitioners in these cases present evidence that their mental conditions prevented them from filing a timely habeas petition. Rather, they were capable only of referring to prior psychiatric evaluations, and required an evidentiary hearing on this issue of causation—precisely the same relief Petitioner seeks here.

required "to carry a burden of persuasion at this stage in order to merit further investigation into the merits of his argument for tolling," and remanded the case for "further factual development" to determine whether the petitioner's mental condition warranted equitable tolling of AEDPA. *Id.* at 924. Like the Third Circuit in *Nara*, the Ninth Circuit emphasized the need for an evidentiary hearing on the basis of the habeas petitioner's "unrebutted allegation" of mental defect, and held that such an allegation of mental disease was sufficient to require "further factual development." *Id.* "[E]ntirely in accord with a recent Third Circuit decision addressed to similar facts," *id.* (citing *Nara*, 264 F.3d at 319-20), the *Laws* appeals court remanded the case back to the district court with instructions to allow discovery and expansion of the factual record.[4]

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[4] The central holding in *Laws* has been reaffirmed by the Ninth Circuit in a number of subsequent cases. *See Lopez v. Kernan*, 192 F. App'x 659, 660 (9th Cir. 2006) ("[a] petitioner is entitled to an evidentiary hearing or an opportunity for further factual development of equitable tolling if he alleges facts 'that would if true, entitle him to equitable tolling'" (quoting *Laws*, 352 F.3d at 921)). For example, *Queen v. Newland*, 109 F. App'x 884 (9th Cir. 2004), an opinion following on the heels of *Laws*, remanded a summary denial of equitable tolling, noting that the district court "did not have the benefit of our decision in *Laws*." *Id.* at 885. The petitioner in *Queen* argued he was entitled to equitable tolling "because of his mental health," and—in accordance with the *Laws* principle—the Ninth Circuit instructed the district court to "make a determination after further development of the record." *Id.* In addition, as with subsequent application of *Nara* in the Third Circuit, the district courts in the Ninth Circuit have consistently interpreted *Laws* as mandating an inquiry into the factual circumstances of an

Petitioner's plea for an evidentiary hearing to determine whether her mental illness prevented compliance with the AEDPA filing period is virtually identical to the pleas sustained in *Nara* and *Laws*. As with the petitioners in those cases, Ms. McSwain here submitted her habeas filings within one year after the end of state post-conviction proceedings. Petitioner also presented substantial evidence of her mental condition by stating that she was "incompetent, due to dissociative identity disorder," in her habeas petition (Pet. App. 122a-123a), attaching affidavits of psychiatric testimony, and arguing in her opposition to the State's motion to dismiss that a "threshold showing of incompetence" was made. Moreover, Petitioner also alleged that "periods of incompetency" had affected her ability to file her habeas petition. Pet. App. 15a, 136a. In sum, Petitioner here proceeded in a nearly identical fashion to the petitioners in *Nara* and *Laws*. Indeed, counsel for the State conceded that a denial of Petitioner's request for an evidentiary hearing would be in conflict with the Third Circuit's opinion in *Nara*, stating before the Sixth Circuit that, were the court bound by the law of the Third Circuit, "the cases would require a remand." Pet. App. 238a. Nevertheless, the Sixth Circuit in this case affirmed the grant of the State's motion to dismiss without

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equitable tolling claim. *See Elmore v. Knowles*, No. S-05-1641 GEB, 2007 WL 2275169, at *8 (E.D. Cal. Aug. 7, 2007) ("While the undersigned does not find petitioner should be granted equitable tolling . . . based on the evidence submitted, the court has little choice, in light of *Laws*, but to grant, as petitioner alternatively suggests, an evidentiary hearing on the question of whether petitioner should have equitable tolling.").

affording Petitioner an evidentiary hearing on causation—whether her mental condition (as to which there concededly was "substantial evidence" (Pet. App. 12a)) prevented her from meeting the AEDPA filing deadline.

The issue here is whether a habeas petitioner who has presented credible evidence of her mental illness is entitled to an evidentiary hearing on the issue of causation—that is, whether her mental illness prevented compliance with the AEDPA filing period. The Third and Ninth Circuits recognize that a showing of mental illness during the period in question is sufficient, without more, to trigger an evidentiary hearing as to causation. The Sixth Circuit, by contrast, would impose a substantial pleading (and proof) requirement that would effectively foreclose habeas relief for many petitioners afflicted by mental illness. As the record in this case indicates, Petitioner repeatedly had difficulty comprehending both the orders of the courts below and the motions filed by the State. Pet. App. 81a-83a. Imposing a pleading or proof burden in addition to the required showing of her mental illness during the relevant time fails to further any purpose of AEDPA or equitable tolling principles generally. By contrast, the opinions of the Third and Ninth Circuits in *Nara* and *Laws*, respectively, do not impose this additional hurdle, and thus better reflect this Court's insistence on rules that effectively balance the petitioner's "right to pursue constitutional claims in federal court," *Lawrence*, 549 U.S. at 344, with "the principles of comity, finality and federalism"

embodied by AEDPA. *Williams v. Taylor*, 529 U.S. 420, 436 (2000).[5]

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

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[5] Furthermore, the approach of the Third and Ninth Circuits is preferable as a matter of policy and sound judicial administration. To make the availability of an evidentiary hearing into whether a prisoner's mental illness prevented a timely filing turn on a special pleading burden is to erect an entirely inappropriate hurdle because prisoners suffering from a mental condition cannot be presumed capable of making such a specific pleading.

Respectfully Submitted,

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January 23, 2009

APPENDIX

No. 06-1920

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Rosemarie McSWAIN, Petitioner-Appellant,
v.
Susan DAVIS, Warden, Respondent-Appellee.

July 15, 2008.

Appeal from the United States District Court for the Eastern District of Michigan.

BEFORE: SUHRHEINRICH and ROGERS, Circuit Judges; and BELL, Chief District Judge.*

BELL, District Judge.

Rosemarie McSwain, a Michigan prisoner proceeding *pro se*, appeals the district court's order dismissing her petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 as time-barred. For the reasons stated herein we affirm.

I. BACKGROUND

On April 19, 1988, Rosemarie McSwain, who was working as a prostitute, killed one of her customers. On October 28, 1988, following a jury trial, she was convicted of first-degree premeditated murder and sentenced to life in prison without the possibility of

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* The Honorable Robert Holmes Bell, Chief United States District Judge for the Western District of Michigan, sitting by designation.

parole.[1] The Michigan Court of Appeals affirmed her convictions, *People v. McSwain*, No. 115067 (Mich. Ct. App. Oct. 8, 1990), and the Michigan Supreme Court denied leave to appeal, *People v. McSwain*, No. 90408, 437 Mich. 1029 (Mich. June 28, 1991).

On August 13, 1998, almost ten years after her conviction, McSwain filed a motion for relief from judgment in state court based on newly discovered evidence. McSwain alleged that she had recently been diagnosed with Dissociative Identity Disorder ("DID"), formerly known as multiple personality disorder, a mental illness that she had likely been suffering from since childhood. She alleged, based upon this diagnosis, that she had been incompetent to stand trial and lacked criminal responsibility at the time of the crimes for which she was convicted, and that information about her mental disability had not been available or discoverable at the time of her trial or her appeal.

After conducting an evidentiary hearing the state post-conviction trial court found that if the evidence of McSwain's DID had been presented to the judge and/or jury at the time of trial, there was a substantial likelihood that she would have been declared incompetent, and there was a reasonable likelihood that the jury would have decided the case differently. The court accordingly found that McSwain had met the cause and prejudice requirements of Michigan Court Rule 6.508(D)(3), and granted McSwain's motion for a new trial. *People v.*

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[1] McSwain was convicted of first degree murder in violation of Mich. Comp. Laws § 750.316(1)(a) and possession of a firearm during the commission of a felony in violation of Mich. Comp. Laws § 750.227b.

McSwain, No. 88-45197-FC (Kent Co. Cir. Ct. Aug. 21, 2002).

On December 9, 2003, the Michigan Court of Appeals reversed the order granting a new trial. *People v. McSwain*, 259 Mich. App. 654, 676 N.W.2d 236 (2003). The Michigan Court of Appeals concluded that although McSwain had presented significant evidence of her current mental condition, her experts could only speculate that she suffered from DID at the time of her trial and that her mental condition at the time of the trial was such that she did not understand the charges against her and could not knowingly assist in her defense. *Id.* at 255-57. The court of appeals accordingly held that McSwain had failed to show prejudice, and that the district court had abused its discretion in granting the order for a new trial. *Id.* at 257. The Michigan Supreme Court denied further review on September 16, 2004. *People v. McSwain*, No. 125546, 471 Mich. 877, 688 N.W.2d 499 (Mich. Sept. 16, 2004) (Table). McSwain filed her federal habeas petition on September 14, 2005. On March 20, 2006, Respondent-Appellee Susan Davis, Warden (hereinafter "the State") moved to dismiss the petition because it was not timely. Two months later, having received no response to the motion, the district court granted the motion to dismiss because McSwain's petition was time-barred under 28 U.S.C. § 2244(d): it was not filed before April 24, 1997 (the expiration of the one-year grace period after the effective date of AEDPA); McSwain did not present newly-discovered evidence; McSwain did not make a showing that her mental incompetence rendered her unable to file her habeas petition within the one-year limitations period; and McSwain had neither alleged nor established that

she is actually innocent. *McSwain v. Davis*, No. 05-CV-7345-DT, slip op. at 3-6 (E.D. Mich. May 23, 2006). The district court also denied a certificate of appealability. *Id.* at 7. McSwain submitted her untimely[2] *pro se* response to the motion to dismiss two days after the district court dismissed her petition. At that time she also filed a motion for appointment of counsel and for an evidentiary hearing. McSwain did not file a motion for reconsideration of the order dismissing her habeas petition.

McSwain appealed the dismissal of her habeas petition. We granted a certificate of appealability limiting the issues for review to (1) whether McSwain's habeas petition was timely pursuant to 28 U.S.C. § 2244(d)(1)(D); and (2) whether Mc- Swain's subsequent diagnosis of DID rendered her incompetent to stand trial.

II. Analysis

McSwain contends that the district court erred in dismissing her habeas petition. She asserts that her habeas petition was timely filed, or, in the alternative, that she is entitled to equitable tolling either because her mental illness prevented her from filing the petition in a timely manner, or because she has raised a credible claim of actual innocence.

A. The Statute of Limitations

The Antiterrorism and Effective Death Penalty Act (AEDPA) established a one-year limitations period for habeas petitions brought by prisoners challenging

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[2] Local rules require a response to a dispositive motion to be filed within 21 days after service of the motion. ED Local Rule 7.1(d)(1)(B).

state-court convictions. 28 U.S.C. § 2244(d); *McCray v. Vasbinder*, 499 F.3d 568, 571 (6th Cir. 2007), *cert. denied*, --- U.S. ----, 128 S.Ct. 1236, 170 L.Ed.2d 81 (2008). The limitations period begins to run from the latest of four enumerated events.[3] 28 U.S.C. § 244(d)(1). McSwain relies on the fourth of these events: "the date on which the factual predicate of the

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[3] Section 2244(d) states in relevant part:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-
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> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d). Prisoners whose convictions became final prior to April 24, 1996, the AEDPA's effective date, had a one-year grace period in which to file their federal habeas petitions. *McClendon v. Sherman*, 329 F.3d 490, 493 (6th Cir. 2003).

claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D).

We review a district court's dismissal of a habeas petition as time-barred under the *de novo* standard of review, but we review the district court's factual findings for clear error. *Souter v. Jones*, 395 F.3d 577, 584 (6th Cir. 2005).

McSwain contends that her federal habeas petition was timely filed because it was filed less than one year after the conclusion of her state postconviction proceedings. Her contention that the one-year limitations period for newly discovered evidence commences at the conclusion of the state post-conviction proceedings does not find support in the statute. The statute clearly provides that the one-year period shall be measured from the time the new evidence "could have been discovered through the exercise of reasonable diligence." 28 U.S.C. § 2244(d)(1)(D). It provides for tolling only while the state review is "pending." 28 U.S.C. § 2244(d)(2). A state petition for post-conviction review tolls, but does not restart AEDPA's one-year statute of limitations. *See Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004) (holding that a state petition for post-conviction review claiming ineffective assistance of appellate counsel tolls, but does not restart, AEDPA's one-year statute of limitations, and rejecting the argument that the state petition restarted the clock because it was part of the direct review process); *Searcy v. Carter*, 246 F.3d 515, 519 (6th Cir. 2001) ("[A]lthough the filing of the motion for a delayed appeal may have tolled the running of the one-year statute, it did not cause the statute to begin running

anew when the state court denied the motion."). A fair reading of § 2244(d)(1)(D) requires us to find that the time that elapsed between the discovery of the new evidence and the commencement of state post-conviction proceedings as well as the time that elapsed after the conclusion of the state post-conviction proceedings must both be factored into the calculation of the one-year limitations period.

McSwain contends that the new evidence (the factual predicate of her habeas claim) was her diagnosis with DID. Calculation of the limitations period accordingly requires us to determine the date on which McSwain's mental illness could have been discovered through reasonable diligence.

The district court determined that McSwain's habeas petition was not timely under § 2244(d)(1)(D) because McSwain's mental illness was not newly-discovered evidence. *McSwain v. Davis*, slip op. at 4. According to the district court, McSwain and/or her counsel were aware of facts which could have supported a mental incompetency defense at the time of trial, and they could have reasonably discovered her potential mental illness prior to the expiration of the one-year limitations period. *Id.* (citing *McSwain*, 259 Mich. App. at 687, 676 N.W.2d 236).

The district court's determination that McSwain's mental illness was not newly-discovered evidence is not supported by the record. The state postconviction trial court determined that McSwain had shown good cause for not raising the issue of her mental illness earlier. The Michigan Court of Appeals questioned the trial court's good cause finding, but ultimately did not find it necessary to determine whether the trial court's factual findings on the good cause

requirement were clearly erroneous. *McSwain*, 676 N.W.2d at 253. Accordingly, the issue of whether McSwain's mental illness could have reasonably been discovered at the time of her trial was not resolved against her by the Michigan courts.

Although McSwain contends that she has suffered from DID since childhood, she contends that she did not discover her mental illness until 1998. The record is silent as to why McSwain did not discover her mental illness earlier, or what prompted her, in 1997, to obtain the mental health evaluations that resulted in her DID diagnosis. Multiple personality disorder, the former name for DID, has been classified as a dissociative disorder by the American Psychiatric Association since 1987. *McSwain,* 676 N.W.2d at 240. Because McSwain has failed to establish "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," 28 U.S.C. § 2244(d)(1)(D), she did not meet her burden of establishing that her mental illness was newly-discovered evidence.

Nevertheless, for purposes of the present analysis, we will assume that McSwain's DID diagnosis was newly discovered evidence. The evidence of record indicates that McSwain was evaluated by Steven R. Miller, Ph.D., L.P., a licensed psychologist and certified forensic examiner, on three occasions in March 1997, and by Leslie K. Pielack, M.A., a certified social worker and licensed professional counselor, in May and June 1997. Dr. Miller concluded in his report dated February 5, 1998, that McSwain suffers from DID, that he had substantial doubt that she was competent to stand trial in 1988,

and that she would have been legally insane at the time of committing the crimes for which she was convicted. Ms. Pielack reported on August 15, 1997, and again on February 27, 1998, that McSwain met the criteria for DID.

For purposes of our analysis we will assume that the earliest date on which McSwain could have reasonably discovered the mental illness that forms the factual predicate of her habeas claim was February 5, 1998, when Dr. Miller's report confirmed Ms. Pielack's August 15, 1997 diagnosis. We nevertheless are compelled to find that McSwain's habeas petition was not timely. If the one-year limitations period started on February 5, 1998, it had run for over six months before it was tolled by the filing of McSwain's state post-conviction proceedings on August 13, 1998. Accordingly, McSwain had less than six months from the conclusion of her state post conviction proceedings on September 16, 2004, to file her § 2254 petition. Because McSwain did not file her federal petition until September 15, 2005, a year after the conclusion of her state-post conviction proceedings, and more than six months after the one-year statutory limitations period had expired, her petition was untimely.

B. Traditional Equitable Tolling Based on Mental Disease

McSwain contends that even if her petition was not timely, she should be entitled to equitable tolling of the limitations period.

"[W]here the facts are undisputed or the district court rules as a matter of law that equitable tolling is unavailable, we apply the *de novo* standard of review to a district court's refusal to apply the doctrine of

equitable tolling; in all other cases, we apply the abuse of discretion standard." *Dunlap v. United States*, 250 F.3d 1001, 1008 (6th Cir. 2001).

Because AEDPA's one-year statute of limitations is not jurisdictional, the one-year limitations period in § 2255 is subject to the doctrine of equitable tolling. *Souter*, 395 F.3d at 588; *Allen*, 366 F.3d at 401 (citing *Dunlap*, 250 F.3d at 1007). The doctrine of equitable tolling permits the court to excuse late-filed habeas claims in appropriate circumstances. *McCray*, 499 F.3d at 571 (citing *Souter*, 395 F.3d at 588). In determining whether equitable tolling is appropriate we consider the following factors:

> (1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement.

Keenan v. Bagley, 400 F.3d 417, 421 (6th Cir. 2005) (quoting *Andrews v. Orr*, 851 F.2d 146, 151 (6th Cir. 1988)). "[T]hese factors 'are not necessarily comprehensive or always relevant; ultimately every court must consider an equitable tolling claim on a case-by-case basis.'" *Keenan*, 400 F.3d at 421 (quoting *King v. Bell*, 378 F.3d 550, 553 (6th Cir. 2004)). "In essence, the doctrine of equitable tolling allows federal courts to toll a statute of limitations when 'a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control.'" *Id.* (quoting *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560-61 (6th Cir. 2000)). *See also Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S.Ct. 1807,

161 L.Ed.2d 669 (2005) (stating that equitable tolling is available when the petitioner can demonstrate "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way"). We have repeatedly cautioned that equitable tolling should be granted "sparingly." *Solomon v. United States*, 467 F.3d 928, 933 (6th Cir. 2006); *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002); *Dunlap*, 250 F.3d at 1008-09; *see also Keenan*, 400 F.3d at 420 ("Equitable tolling is permissible under the [AEDPA], although rare." (quoting *King*, 378 F.3d at 553)).

Although the initial burden of raising the statute of limitations defense is on the state, the burden of proof is on the habeas petitioner to persuade the court that he or she is entitled to equitable tolling. *McClendon v. Sherman*, 329 F.3d 490, 494 (6th Cir. 2003); *Griffin v. Rogers*, 308 F.3d 647, 653 (6th Cir. 2002).

The district court determined that McSwain failed to meet her burden of establishing entitlement to equitable tolling because she did not set forth any circumstances, either in her habeas petition or in response to the state's motion to dismiss, which allegedly caused her to institute her state court collateral proceedings after the expiration of the one-year limitations period. *McSwain v. Davis*, slip op. at 5. The district court noted that mental incompetence could provide a possible basis for tolling the limitations period, but rejected it in this case because it is not a *per se* reason to toll the statute of limitations and McSwain did not meet her burden of showing that her mental health problems rendered

her unable to file a habeas petition within the limitations period. *Id.* at 5-6.

Although the mental incapacity of the petitioner can warrant the equitable tolling of the statute of limitations, the district court properly determined that mental incompetence is not a *per se* reason to toll a statute of limitations. *See Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001), *overruled in part on other grounds by Carey v. Saffold*, 536 U.S. 214, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002); *Lake v. Arnold*, 232 F.3d 360, 371 (3d Cir. 2000). In order to be entitled to equitable tolling the petitioner must make a threshold showing of incompetence and must also demonstrate that the alleged incompetence affected her ability to file a timely habeas petition. *See Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir. 2003) ("Where a habeas petitioner's mental incompetence in fact caused him to fail to meet the AEDPA filing deadline, his delay was caused by an 'extraordinary circumstance beyond [his] control,' and the deadline should be equitably tolled."); *Nara*, 264 F.3d at 320 ("[T]he alleged mental incompetence must somehow have affected the petitioner's ability to file a timely habeas petition."); *Nowak v. Yukins*, 46 Fed. Appx. 257, 259 (6th Cir. 2002) (holding that the incapacity of the petitioner can warrant the equitable tolling of the statute of limitations where the petitioner makes a threshold showing of incompetence and demonstrates that the incompetence affected her ability to file a timely habeas petition).

The record contains substantial evidence to support McSwain's assertion that she suffers from a mental illness, but it does not contain evidence to support a causal connection between her mental

illness and her ability to file a timely federal habeas petition. Indeed, the record evidence indicates McSwain was able to pursue both direct and collateral challenges to her conviction in the state courts notwithstanding her mental illness. *See Bilbrey v. Douglas*, 124 Fed. Appx. 971, 973 (6th Cir. 2005) (disallowing equitable tolling on the basis of mental incapacity where the habeas petitioner had pursued state court litigation even during the periods when her mental condition was the most impaired); *Price v. Lewis*, 119 Fed. Appx. 725, 726-27 (6th Cir. 2005) (disallowing equitable tolling based on mental illness where the habeas petitioner had actively pursued his claims during the limitations period). Although McSwain was represented by an attorney in the state court proceedings and is currently proceeding *pro se*, this is a distinction without significance in light of the fact that McSwain was also represented by an attorney at the time she filed her federal habeas petition, as evidenced by the fact that her federal habeas petition was prepared and signed by an attorney.

Moreover, McSwain has not alleged any facts that would suggest that her mental illness prevented her from timely filing her habeas petition. She indicated in her untimely response to the motion to dismiss that she believed her petition was timely because it was filed within one year of the conclusion of her state post-conviction proceedings. She did not assert that she was prevented from filing it in a timely manner because of her mental illness. McSwain's misunderstanding as to when the limitations period began does not support equitable tolling of § 2244(d). " '[I]gnorance of the law alone is not sufficient to warrant equitable tolling.' " *Griffin v. Rogers*, 399

F.3d 626, 637 (6th Cir. 2005) (quoting *Rose v. Dole*, 945 F.2d 1331, 1335 (6th Cir. 1991)). This is so even for incarcerated *pro se* habeas petitioners. *Jagodka v. Lafler*, 148 Fed. Appx. 345, 347 (6th Cir. 2005) (per curiam). Even if McSwain's misunderstanding was the result of incorrect advice from her attorney, "a petitioner's reliance on the unreasonable and incorrect advice of his or her attorney is not a ground for equitable tolling." *Allen v. Yukins*, 366 F.3d 396, 403 (6th Cir. 2004) (citing *Jurado v. Burt*, 337 F.3d 638, 644-45 (6th Cir. 2003)).

We conclude that McSwain has not met her burden of establishing that she is entitled to equitable tolling on the basis of her mental illness.

C. Evidentiary Hearing on Equitable Tolling for Mental Illness

McSwain contends that because the district court dismissed her habeas petition before it received her response to the motion to dismiss, she is entitled, at a minimum, to an evidentiary hearing on the issue of whether her mental illness prevented her from timely filing her habeas petition. In support of this argument she directs us to other cases where courts have remanded for an evidentiary hearing on equitable tolling where the record contained evidence of mental illness but no evidence that the mental illness affected the petitioner's ability to present his or her habeas petition. *See Laws*, 351 F.3d at 924-25; *Nara*, 264 F.3d at 320.

McSwain did not raise the issue of equitable tolling on the basis of her mental illness in a timely response to the motion to dismiss. *Cf. Laws*, 351 F.3d at 923 (noting that the petitioner had alleged, in a sworn pleading, that he was incompetent in the years when

his petitions should have been filed). Even when she did file her late response to the motion to dismiss and made reference to her mental illness, she did not assert that she was prevented from timely filing either her habeas petition or her response to the motion to dismiss because of her mental illness. She merely indicated that because she has been suffering from DID since childhood, she "likely suffers periods of incompetency which would effect her ability to file a timely habeas petition." McSwain's speculation about the impact of her mental illness on her ability to timely file her habeas petition is not sufficient to warrant an evidentiary hearing. "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 127 S.Ct. 1933, 1940, 167 L.Ed.2d 836 (2007); *see also Hartman v. Bagley*, 492 F.3d 347, 361 (6th Cir. 2007) (denying a request for a remand where the petitioner had not alleged sufficient facts to warrant an evidentiary hearing), *cert. denied*, --- U.S. ----, 128 S.Ct. 2971, 171 L.Ed.2d 897 (2008). Because McSwain has not alleged any facts, which, if true, would show that her mental illness prevented her from timely filing her habeas petition once she became aware of her DID diagnosis, she is not entitled to a hearing on this issue.

Furthermore, in the motion for an evidentiary hearing filed contemporaneously with her response to the motion to dismiss, McSwain did not request a hearing for the purposes of submitting evidence to explain how her mental illness affected her ability to timely file her habeas petition. She merely requested

an evidentiary hearing on the issue of competency to stand trial. McSwain's suggestion, raised for the first time on appeal, that she might be able to produce some evidence that her mental illness prevented her from timely filing her habeas petition lacks a sufficient factual basis to warrant an evidentiary hearing.

D. Equitable Tolling for Actual Innocence

McSwain contends that even if her mental illness does not excuse her delay in filing her habeas petition, she is nevertheless entitled to equitable tolling based upon her claim of actual innocence.

In *Souter* we held that a credible claim of actual innocence could provide an additional basis for equitable tolling of the § 2244(d)(1) statute of limitations. 395 F.3d at 602. In determining whether a petitioner has met the requirements for establishing a cognizable claim of actual innocence for purposes of equitable tolling, we apply the actual-innocence standard developed in *Schlup v. Delo*, 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), for reviewing a federal habeas petitioner's procedurally defaulted claim. *McCray*, 499 F.3d at 571 (citing *Souter*, 395 F.3d at 596). Under this standard "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327, 115 S.Ct. 851. In determining whether a petitioner has met this standard we consider all the evidence, without regard to its admissibility. *House v. Bell*, 547 U.S. 518, 538, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006). "Based on this total record, the court must make 'a probabilistic determination about what reasonable, properly

instructed jurors would do.'" *Id.* (quoting *Schlup*, 513 U.S. at 329, 115 S.Ct. 851). This standard does not require absolute certainty about the petitioner's guilt or innocence:

> A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt-or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt.

House, 547 U.S. at 538, 126 S.Ct. 2064. "[T]he *Schlup* standard is demanding and permits review only in the 'extraordinary' case." *Id.* (quoting *Schlup*, 513 U.S. at 327, 115 S.Ct. 851).

The district court held that Petitioner was not entitled to equitable tolling on the basis of actual innocence because she had not alleged actual innocence in her § 2255 petition nor had she established that she was actually innocent. *McSwain v. Davis*, slip op. at 6.

Because equitable tolling based upon a claim of actual innocence involves the interpretation of the evidence as a whole and its likely effect on reasonable jurors, it is primarily a question of law on which we do not defer to the district court's judgment. *House*, 547 U.S. at 539-40, 126 S.Ct. 2064. We accordingly review the district court's refusal to apply equitable tolling based on actual innocence under the *de novo* standard of review.

The key question for our determination is whether the new evidence of McSwain's mental illness, together with the evidence presented at trial, establishes that it is more likely than not that no reasonable juror would have found McSwain guilty

beyond a reasonable doubt. *See Schlup*, 513 U.S. at 327, 115 S.Ct. 851; *McCray*, 499 F.3d at 572.

McSwain bears the burden of demonstrating that, in light of the new reliable evidence, it is more likely than not that no reasonable jury would find her guilty beyond a reasonable doubt. *Schlup*, 513 U.S. at 327, 115 S.Ct. 851; *Souter*, 395 F.3d at 590, 598-99. McSwain is not claiming that she did not kill the victim. Rather, her actual innocence claim is based on her assertion that she was not guilty by reason of her insanity.

To prevail on an insanity defense under Michigan law, McSwain would have to show that, as a result of her mental illness, she lacked substantial capacity either to appreciate the wrongfulness of her conduct or to conform her conduct to the requirements of the law. Mich. Comp. Laws § 768.21a(1).

For purposes of demonstrating that she has a credible claim of innocence, McSwain relies on the evidence she submitted at the evidentiary hearing held in her state post-conviction proceedings. The record contains testimony from three mental health experts who concluded that McSwain suffered from DID at the time of their evaluations in 1997 and 1998, and that she began developing DID during her childhood. Dr. Gregory Miklashek, a practicing psychiatrist at Forest View Psychiatric Hospital in Grand Rapids, Michigan, testified that DID is difficult to diagnose, that it needs to be distinguished from malingering, and that DID sufferers can make rational and critical decisions in some areas. He testified that McSwain does not suffer from "full-blown DID," but that he did not believe that McSwain was malingering, and that he would be

"flabbergasted" if her DID had not been ongoing since her abuse began at approximately age three. Dr. Miller testified that because it is likely that McSwain suffered from DID from childhood, there was a "very high probability" that she suffered from DID in 1988, that she was not competent to stand trial, and that she was not legally responsible for the crime. Ms. Pielack testified that McSwain's DID impairment was "severe" and that based on her diagnosis that McSwain had DID in 1997, the "likelihood is very good" that she had the disease in 1988.

McSwain's close friend and fellow inmate, Debra Carathoni, testified that McSwain was subject to changes in her personality and demeanor, but that she could communicate with McSwain even when she was in different personalities or demeanors. McSwain testified about her abusive childhood, but she did not testify about the murder or the trial. The only testimony McSwain produced relating to the time of her trial was the testimony of her trial counsel, Thomas Parker. Mr. Parker testified that when he first met McSwain she was shy and pleasant, but that his subsequent meetings with her were very different because she was forward, brazen and brassy. McSwain told Mr. Parker that she did not commit the murder, but she offered him no other information to assist in her defense. According to Mr. Parker, McSwain appeared to understand that she was being tried for first degree murder and was able to discuss the issue of whether or not she should testify. Mr. Parker testified that he had significant experience in defending clients with mental health problems, but that there was nothing about McSwain's behavior that suggested to him that she

suffered from a mental illness. He accordingly did not request a competency examination. Mr. Parker testified that when McSwain was questioned by the trial court on her decision not to testify, she did not appear to be confused and she responded appropriately to the court's questions.

The State offered the testimony of Dr. Arthur Marroquin, a doctor of clinical psychology. Dr. Marroquin spent over six hours with McSwain and reviewed police reports, trial transcripts, and records of McSwain's previous psychiatric treatments. Dr. Marroquin testified that McSwain told him that she had provided her trial attorney with names of witnesses to call and that she had discussed a plea bargain with him. Dr. Marroquin noted that at her criminal trial McSwain had responded appropriately to questions by the court regarding her decision not to testify. Dr. Marroquin found no indication of dissociative disorders, much less DID. He concluded that McSwain was not mentally ill and that she was competent to stand trial when he interviewed her, as well as at the time of trial in 1988.

The Michigan Court of Appeals held that the opinion testimony of McSwain's experts regarding her mental condition in 1988 was "at best speculative and at worst after-the-fact extrapolation," and that their opinion testimony on her competency to stand trial in 1988 was "purely speculative." *McSwain*, 676 N.W.2d at 255-56. We agree that the evidence McSwain is relying on in support of her actual innocence claim lacks reliability. None of McSwain's experts had reviewed the transcript of her 1988 trial or the police reports from that time before reaching

their conclusion that she suffered from DID ten years before. Dr. Miller opined on the ultimate issue of McSwain's lack of competency and criminal responsibility without articulating the basis for his opinion, even though he acknowledged that persons with DID can be competent to stand trial, that McSwain was currently competent to stand trial, that there was nothing strange or unusual in McSwain's colloquy with the trial court about her decision not to testify, and that he had not reviewed either the trial transcript or police records before reaching his conclusion.

The Supreme Court held that the gateway actual innocence standard had been met in *House* where new DNA evidence undermined the central forensic proof connecting House to the murder and House put forward substantial evidence pointing to a different suspect. 547 U.S. at 554, 126 S.Ct. 2064. We held that the gateway actual innocence standard had been met in *Souter* where the petitioner presented compelling proof that a bottle, the only direct evidence linking him to the death, could not have caused the victim's injuries. 395 F.3d at 596-97.

In contrast to the circumstances found in *House* and *Souter*, McSwain has not met her burden of showing that this is one of those extraordinary cases where a credible claim of actual innocence has been established by new reliable evidence. The evidence McSwain has presented does not raise sufficient doubt about her guilt nor does it undermine confidence in the result of her trial. The available evidence, viewed in its totality, does not compel a conclusion that McSwain was legally insane at the time of the murder. A reasonable juror could easily

discount the opinions of McSwain's experts in their entirety. A reasonable juror could alternatively accept the experts' opinion that she suffered from DID in 1988, but nevertheless reject the conclusion that her disease rendered her legally insane. We cannot say that it is "more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327, 115 S.Ct. 851. We conclude that McSwain has not met her threshold burden of showing she has a credible claim of actual innocence. Accordingly, McSwain is not entitled to equitable tolling on the basis of actual innocence and her habeas claim must be rejected as time-barred.

E. Evidentiary Hearing on Equitable Tolling for Actual Innocence

McSwain contends that if we are not convinced, on the present record, that she is entitled to equitable tolling, we should nevertheless vacate the district court's decision and remand for an evidentiary hearing on her request for equitable tolling on the basis of her actual innocence. *See Jaramillo v. Stewart*, 340 F.3d 877 (9th Cir. 2003) (remanding for an evidentiary hearing where the petitioner had alleged newly discovered evidence of actual innocence that, if credible, would excuse the procedural default); *Jones v. United States*, 153 F.3d 1305, 1308 (11th Cir. 1998) (remanding for a hearing to determine whether the petitioner could avoid the procedural bar under the actual innocence standard where the present record did not clearly resolve the issue).

The State contends that McSwain's request for an evidentiary hearing must be denied because Mc-

Swain had an opportunity to develop the factual basis for her actual innocence claim in state court and "[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Williams v. Taylor*, 529 U.S. 420, 437, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). The State, citing *Holland v. Jackson*, 542 U.S. 649, 652-53, 124 S.Ct. 2736, 159 L.Ed.2d 683 (2004), contends that McSwain is limited to the evidence presented in the State court hearing.

Williams and *Holland*, the cases relied on by State, involved the application of 28 U.S.C. § 2254(e)(2).[4] "Ordinarily, a petitioner must satisfy the conditions imposed by 28 U.S.C. § 2254(e)(2) before being granted a hearing to augment the evidentiary basis for a claim." *Cargle v. Mullin*, 317 F.3d 1196, 1208 (10th Cir. 2003). The Supreme Court has held,

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[4] Section 2254(e)(2) provides:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-
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> (A) the claim relies on-
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> 28 U.S.C. § 2254(e)(2).

however, that § 2254(e)(2) does not address "a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence," and that the standard of review in § 2254(e)(2) does not apply to an actual innocence claim. *House*, 547 U.S. at 539, 126 S.Ct. 2064 (holding that the *Schlup* "more likely than not" standard applied to an actual innocence claim rather than the "clear and convincing" standard § 2254(e)(2)). As noted by the Third Circuit, § 2254(e)(2)'s use of the term "claim" applies to "a substantive request for the writ of habeas corpus" rather than to an excuse for procedural default. *Cristin v. Brennan*, 281 F.3d 404, 418-19 (3d Cir. 2002). *See also Vineyard v. Dretke*, 125 Fed. Appx. 551, 554 (5th Cir. 2005) (noting that § 2254(e)(2) "does not appear to address scenarios like the one in the instant case, in which the factual dispute concerns not a substantive constitutional claim but the federal court's application of a nonconstitutional rule").

We agree with McSwain that because equitable tolling is a defense to a federal statute of limitations applied to a federal habeas petition, it would not generally make sense to require a petitioner to develop the factual basis of her equitable tolling argument in state court proceedings. Accordingly, it may frequently be appropriate to require the district court to hold an evidentiary hearing to enable a procedurally-barred habeas petitioner to develop the factual record necessary to support equitable tolling under the actual innocence standard. This is not such a case, however, because the factual basis of McSwain's equitable tolling argument (actual innocence) is the same as the factual basis of her

substantive habeas claim (actual innocence). McSwain's equitable tolling and her substantive habeas claim both rely on a showing that she suffered from a mental disease in 1988 that rendered her incompetent to stand trial and/or legally insane. McSwain had a full and fair opportunity and substantial incentive to develop the facts in support of her substantive habeas claim at the evidentiary hearing in state court.

McSwain has not suggested that her request for equitable tolling on the basis of actual innocence relies on a different factual basis than her substantive habeas claim. Although the Michigan Court of Appeals considered competency to be the central issue and did not address insanity, McSwain argued both competency and insanity at the state post-conviction evidentiary hearing and presented the same proofs in support of both issues.

McSwain did submit additional proofs to the federal district court in conjunction with her late response to the motion to dismiss. These proofs include the expert reports of Dr. Miller and Ms. Pielack, and affidavits from Mr. Parker and Dr. Adelson. These proofs were not considered by the district court because they were not received by the Court before it ruled on the motion to dismiss. Nevertheless, we have considered these proofs and find that they are consistent with the testimony and evidence produced at the state court evidentiary hearing. They do not add anything of substance that was not already before the district court and do not suggest the need for a further evidentiary hearing.

Having determined that McSwain's habeas petition is subject to dismissal because it was not timely and

was not subject to equitable tolling, we decline to address the second question certified for appeal, *i.e.*, whether McSwain's diagnosis with DID rendered her incompetent to stand trial.

III. CONCLUSION

For the reasons stated, we **AFFIRM** the judgment of the district court dismissing McSwain's habeas claims as time-barred.

No. 06-1920

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
DEC 8 2006
LEONARD Green, Clerk

ROSEMARIE MCSWAIN,	)	
Petitioner-Appellant,	)	
v.	)	ORDER
SUSAN DAVIS, Warden,	)	
Respondent-Appellee.	)	

Rosemarie McSwain, a Michigan prisoner proceeding pro se, appeals the judgment of the district court denying her petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. McSwain has filed an application for a certificate of appealability ("COA") with this court. *See* Fed. R. App. P. 22(b)(1). In addition, McSwain has filed a motion to proceed in forma pauperis ("IFP") and a motion to appoint counsel.

McSwain was convicted in 1988 of first-degree premeditated murder and possession of a firearm during the commission of a felony. The Michigan Court of Appeals affirmed the conviction and the Michigan Supreme Court denied leave to appeal. In 1998, ten years after her conviction, McSwain filed a motion for relief from judgment, claiming newly discovered evidence which indicated that she is

affected by Dissociative Identity Disorder ("DID") and was so affected at the time of trial, rendering her incompetent. The trial court held an evidentiary hearing and granted the motion, finding that McSwain was not competent at the time of trial. On appeal, the Michigan Court of Appeals reversed, finding that McSwain did not meet her burden of demonstrating actual prejudice. The Michigan Supreme Court denied leave to appeal the reversal.

On September 14, 2005, McSwain filed the instant petition for a writ of habeas corpus, asserting entitlement to habeas relief due to her incompetence to stand trial in 1998 as a result of DID. Respondent filed a motion to dismiss, arguing that McSwain failed to comply with the one-year statute of limitations contained in 28 U.S.C. § 2244. The district court granted the respondent's motion, finding that McSwain's petition was untimely and that equitable tolling was not available. The district court dismissed the petition with prejudice and denied a COA. McSwain now seeks a COA from this court.

A COA is issued "only if the applicant has made a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). A petitioner may meet this standard by demonstrating that reasonable jurists could debate whether the petition should have been determined in a different manner, *Banks* v. *Dretke*, 540 U.S. 668, 705 (2004), or that the issues presented were "adequate to deserve encouragement to proceed further." *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000). In a case where the habeas petition has been denied on a procedural ground without reaching the underlying constitutional claims, the court must

find that the petitioner has demonstrated that reasonable jurists could debate whether the petition states a valid claim of the denial of a constitutional right *and* that reasonable jurists could debate whether the district court was correct in its procedural ruling. *Id.* After review, we conclude that McSwain has demonstrated that reasonable jurists could debate whether her claims should have been determined differently.

First, reasonable jurists could debate whether the district court was correct in its procedural ruling. The AEDPA sets forth a one-year period of limitations for the filing of federal habeas corpus petitions. 28 U.S.C. § 2244(d)(1). Pursuant to 28 U.S.C. § 2244(d)(1)(D), a prisoner may file a habeas corpus petition within one year of the date on which the factual predicate of the claim presented "could have been discovered through the exercise of due diligence." McSwain's conviction became final in 1988, but the record indicates that she was not evaluated by doctors until 1997 and did not become aware of her diagnosis until 1998. Thus, reasonable jurists could debate that the "factual predicate" of the claim was not discovered until that time. *See West v. Brown*, No. 03-15867, 2006 WL 2337193, at *1 (9th Cir. 2006).

Moreover, the limitations period of § 2244(d)(1)(D) is subject to tolling during the time which a properly filed application for state post-conviction is pending. *See* 28 U.S.C. § 2244(d)(2). The record reveals that McSwain filed her state post-conviction motion in 1998; accordingly, the one-year limitations period was tolled until the time the Michigan Supreme Court denied leave to appeal on September 16, 2004.

Because McSwain filed her habeas petition on September 14, 2005, reasonable jurists could find that her petition was timely.

Reasonable jurists could also debate whether the petition states a valid underlying claim of the denial of a constitutional right, evidenced simply by the differing conclusions reached by the trial court and the Michigan Court of Appeals. Accordingly, McSwain's application for a COA is granted. Her motion to proceed in forma pauperis is also granted. Additionally, because the interests of justice so require, *see* 18 U.S.C. § 3006A(g), McSwain's motion for the appointment of counsel is granted.

Accordingly, the case will proceed on the following certified issues: whether McSwain's habeas petition was timely pursuant to 28 U.S.C. § 2244(d)(l)(D), and whether McSwain's subsequent diagnosis of DID rendered her incompetent to stand trial. After counsel is selected, the clerk is directed to establish a briefing schedule.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

ROSEMARIE MCSWAIN, Petitioner,

v.

SUSAN DAVIS, Respondent.

CASE NO. 05-CV-73545-DT

HONORABLE GERALD E. ROSEN, United States District Judge.

OPINION AND ORDER (1) GRANTING RESPONDENT'S MOTION TO DISMISS AND DISMISSING PETITION FOR WRIT OF HABEAS CORPUS, AND (2) DENYING A CERTIFICATE OF APPEALABILITY AND LEAVE TO PROCEED ON APPEAL *IN FORMA PAUPERIS*

Rosemarie McSwain ("Petitioner"), a state prisoner currently confined at the Huron Valley Complex Women's Facility in Ypsilanti, Michigan, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 alleging that she is incarcerated in violation of her constitutional rights. This matter is before the Court on Respondent's motion to dismiss the petition as untimely. For the reasons set forth below, the Court grants Respondent's motion and dismisses the petition for failure to comply with the one-year statute of limitations set forth at 28 U.S.C. § 2244(d).

I. Facts and Procedural History

Petitioner was convicted of first-degree murder and felony firearm following a jury trial in the Kent County Circuit Court in 1988 and was sentenced to life imprisonment without the possibility of parole and a consecutive term of two years imprisonment on those convictions. Petitioner filed an appeal as of right with the Michigan Court of Appeals, which affirmed her convictions. *People v. McSwain*, No. 115067 (Mich. Ct. App. Oct. 8, 1990). Petitioner also filed an application for leave to appeal with the Michigan Supreme Court, which was denied. *People v. McSwain*, No. 90408 (Mich. June 28, 1991).

On August 13, 1998, Petitioner filed a motion for relief from judgment with the state trial court asserting that she was incompetent to stand trial due to dissociative identity disorder. The trial court granted the motion on August 21, 2002. The prosecution appealed by leave and the Michigan Court of Appeals reversed the trial court's decision. *People v. McSwain*, 259 Mich. App. 654, 676 N.W.2d 236 (Dec. 9, 2003). Petitioner filed an application for leave to appeal with the Michigan Supreme Court, which was denied. *People v. McSwain*, 471 Mich. 877, 688 N.W.2d 499 (Sept. 16, 2004).

Petitioner dated her present petition for writ of habeas corpus on September 14, 2005. In her pleadings, Petitioner asserts that she is entitled to habeas relief because she was incompetent to stand trial due to dissociative identity disorder. Respondent filed the instant motion to dismiss on March 20, 2006 asserting that the petition fails to comply with the one-year statute of limitations

applicable to federal habeas actions. Petitioner has not filed a response to the motion.

II. Discussion

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. § 2241 *et seq.*, became effective on April 24, 1996. The AEDPA governs the filing date for this action because Petitioner filed her petition after the AEDPA's effective date. *See Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). The AEDPA amended 28 U.S.C. § 2244 to include a one year period of limitations for habeas petitions brought by prisoners challenging state court judgments. The revised statute provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> > (A the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

Petitioner's convictions became final before the AEDPA's April 24, 1996 effective date. Prisoners whose convictions became final prior to the AEDPA's effective date are given a one year grace period in which to file their federal habeas petitions. *See Abela v. Martin*, 348 F.3d 164, 167 (6th Cir. 2003). Accordingly, Petitioner was required to file her habeas petition on or before April 24, 1997, excluding any time during which a properly filed application for state post-conviction or collateral review was pending in accordance with 28 U.S.C. § 2244(d)(2).

Petitioner did not file her state court motion for relief from judgment until August, 1998. Thus, the one-year limitations period had expired well before Petitioner sought state post-conviction review. A state court post-conviction motion that is filed following the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled. *See Hargrove v. Brigano*, 300 F.3d 717, 718 n. 1 (6th Cir. 2002); *Webster v. Moore*, 199 F.3d 1256, 1259 (11 Cir. 2000); *see also Jurado v. Burt*, 337 F.3d 638, 641 (6th Cir. 2003). Petitioner's state post-conviction proceedings did not toll the running of the statute of limitations. Furthermore,

the AEDPA's limitations period does not begin to run anew after the completion of state post-conviction proceedings. *See Searcy v. Carter*, 246 F.3d 515, 519 (6th Cir. 2001).

Petitioner does not allege that the state created an impediment to the filing of her habeas petition or that her claims are based upon newly-discovered facts or newly-recognized constitutional rights. Moreover, even if asserted, Petitioner cannot establish that her habeas claim is based upon newly-discovered facts. In such a case, the limitations period begins when the factual predicate for a petitioner's claim could have been discovered through the exercise of due diligence, not when it was actually discovered by the petitioner. *See Brooks v. McKee*, 307 F. Supp. 2d 902, 905-06 (E.D. Mich. 2004) (citing cases). Additionally, the time commences when the petitioner knows or through due diligence could have discovered the important facts for the claim, not when the petitioner recognizes the facts' legal significance. *Id.* The start of the limitations period does not await the collection of evidence to support those facts. *Id.* In this case, the record indicates that Petitioner and/or her counsel were aware of facts which could have supported a mental incompetency defense at the time of trial. *See McSwain*, 259 Mich. App. at 687. Additionally, Petitioner may have known or could have reasonably discovered her potential mental illness prior to the expiration of the one-year limitations period. The possible fact of Petitioner's mental illness is therefore not newly-discovered. Her habeas action is thus barred by the statute of limitations set forth at 28 U.S.C. § 2244(d).

The United States Court of Appeals for the Sixth Circuit has determined that the one-year limitations period is not a jurisdictional bar and is subject to equitable tolling. In *Dunlap v. United States,* 250 F.3d 1001, 1008-09 (6th Cir. 2001), the Sixth Circuit ruled that the test to determine whether equitable tolling of the habeas limitations period is appropriate is the five-part test set forth in *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988). The five parts of this test are:

> (1) the petitioner's lack of notice of the filing requirement; (2) the petitioner's lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the respondent; and (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim.

Dunlap, 250 F.3d at 1008. A petitioner has the burden of demonstrating that she is entitled to equitable tolling. *See Griffin v. Rogers*, 308 F.3d 647, 653 (6th Cir. 2002). "Typically, equitable tolling applied only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control." *Jurado v. Burt*, 337 F.3d at 642 (quoting *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560 (6th Cir. 2000)).

Petitioner sets forth no circumstances which caused her to institute her state court collateral proceedings after the expiration of the one-year limitations period. The fact that Petitioner is untrained in the law, was proceeding without a lawyer, or may have been unaware of the statute of limitations for a certain period does not warrant

tolling. *See Allen v. Yukins*, 366 F.3d 396, 403 (6th Cir. 2004) (ignorance of the law does not justify tolling); *Holloway v. Jones*, 166 F. Supp. 2d 1185, 1189 (E.D. Mich. 2001) (lack of professional legal assistance does not justify tolling); *Sperling v. White*, 30 F. Supp. 2d 1246, 1254 (C.D. Cal. 1998) (citing cases establishing that ignorance of the law, illiteracy, and lack of legal assistance do not justify tolling). Additionally, a petitioner's possible mental incompetence is not a *per se* reason to toll the statute of limitations for filing a federal habeas petition. *See Brown v. McKee*, 232 F. Supp. 2d 761, 767-68 (E.D. Mich. 2002). Rather, the alleged mental incompetence must somehow have affected the petitioner's ability to timely file a habeas petition. *Id.* (citing cases). The petitioner bears the burden of showing that mental health problems rendered her unable to file a habeas petition within the one-year limitations period. *Id.* Petitioner has made no such showing.

The Sixth Circuit has recently held that a credible claim of actual innocence may equitably toll the one-year statute of limitations set forth at 28 U.S.C. § 2244(d)(1). *See Souter v. Jones*, 395 F.3d 577, 588-90 (6th Cir. 2005); *see also Holloway*, 166 F. Supp. 2d at 1190. As explained in *Souter, supra*, to support a claim of actual innocence, a petitioner in a collateral proceeding "must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327-28, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)). A valid claim of actual innocence requires a petitioner "to support his allegations of constitutional error with

new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness account, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. Furthermore, actual innocence means "factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623. Petitioner has neither alleged nor established that she is actually innocent. She has thus failed to demonstrate that she is entitled to equitable tolling of the one-year period.

III. Conclusion

Based on the foregoing analysis, the Court concludes that Petitioner failed to file her habeas petition within the one-year limitations period established by 28 U.S.C. § 2244(d) and that the statute of limitations precludes federal review of the petition.

Before Petitioner may appeal this Court's dispositive decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a federal district court denies a habeas claim on procedural grounds without addressing the claim's merits, a certificate of appealability should issue, and an appeal of the district court's order may be taken, if the petitioner shows that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 484-85, 120 S. Ct. 1595,

146 L. Ed. 2d 542 (2000). When a plain procedural bar is present and the district court is correct to invoke it to dispose of the matter, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petition should be allowed to proceed. In such a case, no appeal is warranted. *Id.*

This Court is satisfied that jurists of reason could not find this Court's procedural ruling debatable. No certificate of appealability is warranted in this case nor should Petitioner be granted leave to proceed on appeal *in forma pauperis*. *See* Fed. R. App. P. 24(a).

Accordingly,

IT IS ORDERED that the petition for writ of habeas corpus is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED** and leave to proceed on appeal *in forma pauperis* is **DENIED**.

s/Gerald E. Rosen
Gerald E. Rosen
United States District Judge

Dated: May 23, 2006

I hereby certify that a copy of the foregoing document was served upon counsel of record on May 23, 2006, by electronic and/or ordinary mail.

s/LaShawn R. Saulsberry
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROSEMARIE MCSWAIN,

Petitioner,

CASE NO. 05-CV-73545-DT

v. HONORABLE GERALD E. ROSEN

SUSAN DAVIS,

Respondent.

_____/

JUDGMENT

The above-entitled matter having come before the Court on a Petition for Writ of Habeas Corpus brought pursuant to 28 U.S.C. § 2254, the Honorable Gerald E. Rosen, United States District Judge, presiding, and in accordance with the Opinion and Order entered on this date;

IT IS ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus is **DISMISSED WITH PREJUDICE.**

s/Gerald E. Rosen
Gerald E. Rosen
United States District Judge

Dated: May 23, 2006

I hereby certify that a copy of the foregoing document was served upon counsel of record on May 23, 2006, by electronic and/or ordinary mail.

s/LaShawn R. Saulsberry
Case Manager

SUPREME COURT OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,

v.

ROSEMARIE McSWAIN, a/k/a ROSE MARIE-JEANETTE McSWAIN,

Defendant-Appellant.

SC: 125546

September 16, 2004, Decided

ORDER

On order of the Court, the application for leave to appeal the December 9, 2003 judgment of the Court of defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

COURT OF APPEALS OF MICHIGAN

No. 241275

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v.

ROSEMARIE McSWAIN,
also known as ROSE MARIE-JEANETTE McSWAIN,
Defendant-Appellee.

August 6, 2003, Submitted
December 9, 2003, Decided

Before: Whitbeck, C.J., and Smolenski and Murray, JJ. Smolenski, J., concurred. Murray, J. (concurring).

WHITBECK, C.J.

The prosecution appeals by leave granted the trial court's grant of defendant Rosemarie McSwain's motion for relief from judgment. The central issue in this case is whether McSwain was competent to stand trial for murder in 1988. Because we conclude that the trial court abused its discretion on the basis of a series of clear errors in the factual findings supporting its determination that McSwain was not competent, we reverse.

I. Basic Facts And Procedural History

A. McSwain's Conviction

Following a seven-day trial in October 1988, in which fifty witnesses testified, a jury convicted

McSwain of first-degree premeditated murder[1] and possession of a firearm during the commission of a felony.[2] The prosecution's theory of the case was that McSwain, a prostitute, shot and killed one of her customers because he refused to pay her for services. The defense theory of the case was misidentification and alibi. There is no indication in the record of any question concerning McSwain's mental capacity.

At the trial in 1988, Leveta Stewart testified that McSwain and a male fitting the victim's description came to her apartment on April 19, 1988. According to Stewart, McSwain asked her if "they could use a room." Stewart testified that she let McSwain and the victim use her bedroom. After fifteen to twenty minutes, McSwain and the victim came out of the room. Stewart testified that McSwain

> told the guy that he had wasted her time bringing her up there because they had agreed on whatever they agreed on. He's supposed to have gave [sic] her $ 50, and she told him that it was for him wasting her time. She said he was going to give her something for wasting her time, and that it was going to be his ass or hers. . . .
>
> ***
>
> At that time the man was saying he didn't have any money. He said he didn't have any money or whatever else he said, which I didn't understand.
>
> So Rose had went [sic] in her purse and pulled out a gun, and she put it on his privates.

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[1] MCL 750.316(1)(a).

[2] MCL 750.227b.

Stewart testified that after McSwain placed the gun on the victim's penis, she stated that "she was going to blow his nuts off." Stewart stated that she took the gun away from McSwain, putting it in McSwain's purse. Stewart further stated that as McSwain and the victim left, McSwain stated that "she was going to blow his head off . . . ." Stewart testified that she took McSwain's comment as a joke, because she did not know McSwain to be a violent person.

Margaret Gillis testified that as she left work on April 19, 1988, she noticed a car with a man and a woman sitting inside who fit the description of the victim and McSwain, and that they appeared to be talking. As Gillis walked toward her car, she heard a noise that might have been a car backfiring. When Gillis reached her car approximately twenty seconds later, she heard a second sound that sounded the same as the first. Gillis said that she then saw a car rolling backward down the street with "the passenger door open wide, and this man in the car in the driver's side." As the car rolled closer to her, she saw "the man from behind the steering wheel had blood trickling from down the right side of his face." The car eventually came to a stop when it hit a telephone pole. Gillis went back inside her place of work to call 911.

Dr. Stephen Cohle, a forensic pathologist, performed an autopsy on the victim and determined that the cause of death was a gunshot wound to the head and a gunshot wound to the right arm and chest. Dr. Cohle testified that the first bullet entered through the victim's right upper eyelid and was most likely fired from a range of six to twelve inches. The

second bullet passed through the victim's right arm and into the right side of the chest, ultimately stopping in the victim's aorta.

Three of McSwain's cellmates at the Kent County jail testified that she had confessed to the murder. Carmen Williams testified that McSwain first claimed that she did not kill the victim, but later stated that she "didn't mean to do it . . . ." Sequita Eaves testified that she overheard McSwain say she "didn't mean to do it." Linda Nusbaum testified that she heard McSwain say that she "didn't mean to—for it to happen and that she was sorry . . . ."

The jury found McSwain guilty of first-degree murder and felony-firearm, and she appealed as of right to this Court, raising six issues, none of which related to McSwain's mental capacity. This Court affirmed McSwain's convictions in an unpublished opinion per curiam.[3] The Michigan Supreme Court denied leave to appeal.[4]

B. McSwain's Motion For Relief From Judgment

In August 1998, McSwain moved for relief from judgment pursuant to MCR 6.500 *et seq.* She claimed, for the first time, that there "has been newly discovered evidence that [she] is affected by Multiple Personality Disorder, was so affected at the time of the crime and at the time of the trial, and is in need of highly specialized and intensive treatment." She claimed that this information was not available to her trial counsel for the purpose of preparing a

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[3] Unpublished opinion per curiam, issued October 8, 1990 (Docket No. 115067).

[4] *People v McSwain*, 437 Mich. 1029; ___ N.W.2d ___ (1991).

defense. She asked that the judgment of sentence be set aside pursuant to MCR 6.500 *et seq.* because she "was incompetent to stand trial; she was not available to consult with her attorney and help him prepare a defense, even though it is now evident that self-defense was available to justify the killing." She stated, "It is also probable that the core personality was not present for a portion, or for all, of the trial." Citing MCR 6.508(D)(1) and (2), she stated that she "could not have presented evidence of multiple personality disorder because it was not available to her at the time of trial; it is newly discovered evidence, and may be raised at this time."

Citing *Rogers v Howes*,[5] McSwain asserted in her motion that, because MCR 6.500 created a procedural bar that was not firmly established and regularly followed at the time of her conviction, there was no need for her to show cause and prejudice. Alternatively, she asserted that she was permitted to raise her claim under the general requirements for relief found at MCR 6.508(D), noting in a footnote and citing MCR 6.508(D)(3)(b), that the court may waive the good cause requirement if it concludes there is a significant possibility that the defendant is innocent. Finally, she asserted that she was actually innocent of the charges stating that "she, Rosemarie McSwain, did not commit them; whatever alter [meaning alternative personality] did commit them was acting in self-defense" and that under these circumstances "the good cause requirement can be waived."

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[5] *Rogers v Howes*, 144 F.3d 990 (CA 6, 1998).

C. The Evidentiary Hearing

1. Overview

The trial court held an evidentiary hearing on McSwain's motion for relief on October 2 and 3, 2000. McSwain presented five witnesses in addition to herself: Thomas Parker, her trial counsel at her 1988 trial; Debra Caratonni, her cellmate; Dr. Greeley Gregory Miklashek, a practicing psychiatrist at Forest View Hospital in Grand Rapids; Dr. Steven Miller, director of the Michigan Institute for Forensic-Clinical-Neuro Psychology; and Ms. Leslie Pielack, a certified social worker and licensed professional counselor at Lake Orion Psychological Services. The prosecution presented one witness: Dr. Arthur Marroquin, the assistant director of the evaluation center at the Center for Forensic Psychiatry.

In her opening statement at the evidentiary hearing, counsel for McSwain indicated that "what we're really talking about here is whether Rosemarie McSwain had a fair trial, and it's my contention that there is no way she had a fair trial" because she "did not have executive function at the time of the killing" and that one of her alternative personalities "came out in a moment where it was perceived self-defense was necessary, and this was a self-defense killing." Counsel indicated that "there was no competency at the time of the trial, and as the Court knows, that is a claim that can be brought up anytime, that is constitutional in nature, it is absolutely fundamental, it is not governed by Michigan court rules or statutes, it is U.S. Supreme Court constitutional law."

The prosecution took a different view. In his opening statement, the prosecutor stated that the

issue was whether McSwain could carry her burden of showing that she was not competent to stand trial at the time of the trial or "[whether] she would have been able to prevail [using] an insanity defense." The prosecutor emphasized that the evidentiary hearing on McSwain's motion for relief from judgment was not for the purpose of making "an inquiry as to whether or not 12 years later someone can conclude that there may have been a self-defense claim available."

Much of the testimony at the evidentiary hearing concerned dissociative identity disorder, formerly known as multiple personality disorder.[6] In 1987, the American Psychiatric Association classified multiple personality disorder as a dissociative disorder.[7] In 1994, multiple personality disorder was renamed dissociative identity disorder,[8] which is characterized by "the presence of two more distinct identities or personality states that recurrently take control of the individual's behavior accompanied by an inability to recall important personal information that is too extensive to be explained by ordinary forgetfulness."[9]

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[6] *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (Washington, DC: American Psychiatric Press, 4th ed, 1994), p 484.

[7] *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (Washington, DC: American Psychiatric Press, 3rd ed, 1987), p ___.

[8] *See Diagnostic and Statistical Manual of Mental Disorders* (4th ed, 1994), *supra*, p 477, and the text revision published in 2000.

[9] *Id.*

2. Testimony Of Thomas Parker

Parker testified that he had been the chief trial attorney for the Kent County Office of the Defender for twenty-three years and had handled over four thousand felony cases. Parker testified that he was assigned to handle McSwain's case in 1988 and that the first time he visited her in jail, "she was a relatively pretty young lady, a shy, tended to be coy maybe in there, very pleasant." Parker stated that McSwain "really wasn't helpful" regarding the case, "because she said she basically didn't know anything about it." Parker testified that his subsequent meetings with McSwain were "considerably different," because "she was extremely forward, brazen, brassy," and "constantly saying 'I didn't do it.'" According to Parker, McSwain "was of no help really whatsoever," because he got "nothing from her" as far as information with which to fashion a defense strategy. During trial, Parker stated, McSwain "just sat there." Parker testified that he tried to explain the trial process to her, but "there was nothing there to indicate to me that at the time, that she didn't understand or that she did." Parker commented:

> It is rare to get a client that comes up like a blank wall, so to speak, where their cooperation is useless. Usually you can get, you know, something. It does happen occasionally but it is extremely rare. And that was essentially what I got, nothing from her, so we defended the case on basically attacking the proofs that were in the case, and try to come up with some alternative explanation of how this person got shot besides her doing it.

Parker testified that he had never encountered multiple personality disorder or dissociative identity disorder. His experiences were mainly with schizophrenics, schizophrenic-paranoids, or manic-depressives. Although Parker had requested competency examinations "many times" before, he did not request one for McSwain. Parker testified that McSwain gave no indication that she did not understand that she was on trial for first-degree murder. According to Parker, McSwain never claimed that she acted in self-defense; instead, she consistently maintained that she "didn't do it."

On cross-examination, Parker stated that McSwain did not do anything that manifested, or that he believed might be, mental illness. He said she did not give any indication that she did not understand that she was being tried for first-degree murder. With respect to McSwain's decision not to testify, he recalled nothing in the colloquy with the trial court on this subject that would have indicated she did not understand that she had the right to testify. He noted that McSwain never mentioned anything about acting in self-defense.

3. Testimony of Debra Carratoni

Debra Carratoni testified that she had known McSwain for six years and had met her at Scott Correctional Facility where she was serving five to fifteen years for embezzlement. Carratoni testified that she and McSwain attended the same vocational and college classes, so she "virtually was able to observe [McSwain] daily, hourly." Carratoni testified that, while she was "not a clinician," there was "something peculiar" about McSwain, and that she and the other cellmates "never really knew who

[they] were gonna see." For example, according to Carratoni, McSwain would wear a ball gown and an extravagant hairdo on a hot summer day, rearrange a room full of heavy desks in order to placate an "extremely anal-retentive [sic]" graphic arts instructor, and wake up in the middle of the night to color with crayons on construction paper, the walls, and the floor. Carratoni testified that McSwain's demeanor and features would change during the day: "I would see changes in her facial muscles, her hair, just everything, her mannerisms." Carratoni testified that McSwain "can be very childlike," but that the "childlike demeanor would evaporate when an authority figure" came around. Carratoni testified that McSwain introduced herself as "Bambi," and that she only referred to McSwain as Bambi. However, Carratoni indicated that she was always able to communicate with McSwain while McSwain was in "different demeanors" that McSwain had named Rose, Rosemarie, Passion, Marie, Maria, Gemini Light, and Gemini Dark.

4. Testimony Of Dr. Greeley Gregory Miklashek

Dr. Miklashek testified that he interviewed McSwain on September 23, 2000, for one hour and ten minutes, and stated that "everything that [he] saw confirmed that [she] has DID [dissociative identity disorder]" and that he only needed about ten minutes of the interview to confirm that. Dr. Miklashek believed one of McSwain's alternative personalities was created during an abuse episode when she was three years old. According to Dr. Miklashek, McSwain described eight alternative personalities to him: "Bambi" (age 19); "Lucy" (age 43, but Dr. Miklashek stated, "I wonder if she is not

actually significantly younger than 43"); "Gemini Dark" (age 47); "Gemini Light" (age 19); "Rose" or "Baby Rose" (age 3); "Rosemarie" (age 16); "Maria" (age 17); and "Passion" (age 18). Dr. Miklashek believed "Bambi" to be McSwain's "co-host" and described "Bambi" as "quite mature" and "thoughtful." Dr. Miklashek believed "Lucy" to be McSwain's "anger alter," who "strikes out when necessary." Dr. Miklashek described "Lucy" as the protector of "Rose," "Rosemarie," and "Gemini Light." Dr. Miklashek noted that the "protective alter and angry alter are almost synonymous, they are almost always the same." Dr. Miklashek said the he "would be flabbergasted if this had not been going on since the abuse began, because that's when it always starts. It's a fragmentation of consciousness that occurs at the time of the abuse experience," but stated that he did not ask McSwain in detail about "how far back she remembered being like this."

Dr. Miklashek testified that when he discussed the murder with McSwain, "she appeared to switch into the Lucy alter with a rather dramatic change in facial expression, which was maintained as long as the Lucy alter was forward." According to Dr. Miklashek, McSwain told him that "Lucy" came forward during the murder because she thought the victim "was going to kill Rosemarie." Dr. Miklashek continued:

> [McSwain] continued to express remorse for the death of the man she's alleged to have shot and his children, and also remorse for her impact on the body and other alters winding up in prison as a result of her aggressive act. She also stated, quote,

"We didn't correspond and share the way we do now."

To elaborate just a little on that, so [sic] what I understand her to be saying is that Lucy is a protector, which she had described and it's in the previous paragraph. She's a protector of Rose and Gemini Light, I have [sic]. Her babies, her special children. And I believe that—I know that also includes Rosemarie is [sic] someone that she looks out for, is protective of. So my understanding of it is that she was afraid that Rosemarie was going to be killed, and her job is to literally protect with her own life these other parts, and that's what she did.

When I at other times asked Bambi what she remembered about those events, she described this as—and I'm quoting again—as the, quote, terrible event, close quote, and further stated, "Regarding a recall, it's like flicks, pieces."

Dr. Miklashek stated that McSwain remembered her pretrial experience as "sort of . . . a package" in which all of her "executive" alternative personalities were gone, that "they had retreated internally." Regarding McSwain's statements at the trial that she understood she had a right to testify on her own behalf, Dr. Miklashek stated that although it "[was] an adult person that's sitting there," "child alters were occupying the body at that time, and . . . she had very little capacity for social judgment or to understand what was happening to her at that time. They were just there to be abused."

On cross-examination, Dr. Miklashek admitted that he did not review the transcript of the trial, that he did not review any police reports, that he did not review any of McSwain's psychiatric history, and that

he had not reviewed the Michigan statute concerning competency to stand trial or the Michigan standard on insanity. When asked whether he would need to know the Michigan definition of insanity before making a statement about the clinical functioning of a patient, Dr. Miklashek responded, "Is 'hell, no' too strong?" He also stated that persons with dissociative identity disorder can function and finish a class in school, operate in a profession, and make rational decisions.

5. Testimony Of Dr. Steven Miller

Dr. Miller testified that he performed two evaluations on McSwain: a normal psychological mental state evaluation and a forensic evaluation. The purpose of these evaluations was to determine whether McSwain suffered from a mental disorder that reached the level of the legally defined concept of insanity and whether she had a legally defined mental illness. Dr. Miller reviewed the records of McSwain's psychiatric history, but did not read the trial transcripts or police reports before evaluating her. Dr. Miller testified that defense counsel introduced him to McSwain at a brief meeting in January 1997, and that he evaluated her on three different occasions in March 1997 for a total of seven to 7-1/2 hours.

Dr. Miller testified that he believed that McSwain developed various personalities at different times in her life "in order to deal with different kinds of trauma and different kinds of situations she was in." Dr. Miller believed that McSwain's personality split when she was three or 3 1/2 years old, forming "Baby Rose." As a teenager, "Rosemarie" developed as "more of a core personality, who was a very passive,

depressed, suicidal teenager . . . ." "Bambi" was "kind of a street-slick prostitute type." "Passion" was a "sexual person" who according to McSwain, was "somebody that led me to try to normalize sexuality and make me feel good about sexuality." "Lucy" was the "angry personality" who "was considered the hard, tough, street-wise personality, who would get things done" and whose function was to "deal with difficult situations." Dr. Miller believed that "Lucy" committed the murder to protect "the system" (i.e., her alternative personalities) and that "Lucy" felt remorse as to how her decision to kill the victim affected "the system."

Dr. Miller concluded that there was "very little doubt" that McSwain suffers from dissociative identity disorder because she met all the diagnostic criteria for the disorder. Dr. Miller testified that there was a "very high probability" that McSwain suffered from dissociative identity disorder in 1988 and that she was incompetent to stand trial and not legally responsible for the crime. Dr. Miller "extrapolated" back to 1988 and reasoned that McSwain

> likely suffered from DID from childhood, so therefore she likely suffered it at that time, and that given that, she would not have had reasonable access to all of the memories she needed in order to assist her defense counsel in making a reasonable mental state reconstruction of what happened.

However, Dr. Miller testified that a person with dissociative identity disorder could be competent to stand trial and believed that McSwain was currently competent to stand trial, because, he explained, "through the interventions of the different clinicians

that have seen her, we've helped her to sort out her system, she's been able to tell a coherent story, we've been able to provide her counsel with a reasonable explanation of what went forward . . . ."

On cross-examination, Dr. Miller stated that he did not read the transcript of the trial, that he did not read any police reports about any prior contacts McSwain had with the police, that he saw nothing strange or unusual in McSwain's colloquy with the trial court about her decision not to testify, and that there was no suggestion that McSwain had used any alias other than "Bambi" in connection with her arrest for the murder.

6. Testimony Of Leslie Pielack

Pielack testified that she twice interviewed McSwain. Pielack recounted McSwain's history, including abuse beginning at age three or four, and continuing into her teenage years; psychiatric hospitalization at age twelve; additional hospitalizations during her teenage years for depression, suicide, and drug use; and a series of sexually abusive relationships with various men, including her stepfather. Pielack testified that McSwain exhibited signs of amnesia, one of the criteria for dissociative identity disorder. Pielack testified that McSwain's demeanor changed several times during the interview:

> There existed a change of eyeglasses, change of facial expressions consistent with different identities, postures, different figures of speech, different voice patterns, different use of slang, and dialect change, alternation from a matter of fact demeanor to a bright demeanor to a suspicious,

> angry and hostile demeanor, et cetera. And that's all during one interview.
>
> [McSwain] would take her glasses off because all of a sudden she would not be able to be using them very well. She would comment upon her clothes in a surprised way, like "What am I doing wearing this? I don't wear things like this. This is not what I would choose to be wearing."

Pielack believed that McSwain started developing alternative personalities at a very young age and that "Lucy" came into being around age twelve. Pielack noted that "Lucy" "presents herself as very, take care of business, not put up with anything from anyone, and a very assertive, aggressive kind of part of self." Pielack testified that "Lucy" emerged and committed the murder to protect McSwain.

On cross-examination, Pielack stated that she did not review the trial transcripts, police reports, any prior police contacts that McSwain may have had, or any documents relating to McSwain's admission to the Huron Valley Center in 1997 before interviewing McSwain. Indeed, in her direct testimony, Pielack outlined her view on the need to review a person's mental health history, her criminal history, and past police reports and legal documents:

> I think that information is usually elicited in the psychiatric history taking. Part of the history—part of the interview is to assess historical information, you know, how old are you, how many brothers and sisters do you have, where did you grow up, you know, what kinds of things have happened in your life. And any kind of legal history is usually asked about, you know, and the person reports that like they would report

anything else about themselves, so it's just another piece of information. In terms of seeking, you know, formal documents, it's not necessary in a clinical interview. It really is not, because the clinical interview is not about that, it's about this clinical presentation now.

Pielack also stated that she would find it significant that McSwain told the treating psychiatrist at the time of her admission in 1997 that she had been given a diagnosis of multiple personality disorder. She further stated that the stress associated with killing someone or being on trial for murder would very possibly make the symptoms of dissociative identity disorder worse. On the question of McSwain's mental capacity at the time of the trial in 1988, Pielack responded to the prosecutor's question as follows:

Q. What you're saying, then, and I don't mean to put words in your mouth, and correct me if I'm wrong, what you are saying is that if she had this in '97 at the time you diagnosed her, she had it in '88?

A. If it's a valid diagnosis, the likelihood is very good, yes.

7. Testimony of Rosemarie McSwain

McSwain testified about sexual abuse she experienced during her childhood. She recounted that her stepfather sexually abused her when she was ten years old by taking her to a shed, tying her up, and forcing her to have oral, anal, and vaginal sex with him. She testified that her stepfather burned her legs with cigarettes, and she showed the scars to the trial court. She recalled her stepfather hanging her upside down. She recounted another incident in

which she was injured when her stepfather inserted a pop bottle into her vagina.

8. Testimony Of Dr. Arthur Marroquin

Dr. Marroquin testified that he interviewed McSwain three times, pursuant to the trial court's order to evaluate her for competency to stand trial and for criminal responsibility. Dr. Marroquin stated that he reviewed the trial transcripts, police reports, and records of McSwain's psychiatric treatment. He noted that it was important to review such records "because the forensic examination, unlike an ordinary clinical examination, requires that you have multiple sources of information for reaching conclusions about a particular individual." He described McSwain as follows:

> Her appearance and demeanor were, I thought, unremarkable. She presented as apparently adequately groomed, clean, dressed in prison clothing, looked her age, was rather unremarkable in presentation and demeanor altogether.

Dr. Marroquin testified that McSwain indicated that dissociative identity disorder was a problem she had experienced for "most of her life, at least back into adolescence, and that she had only learned about it in her adulthood . . . ." He stated that McSwain described to him "how she had various personalities within her personality that were at different times in control of her." Dr. Marroquin noted that he did not see any changes in McSwain's demeanor as she was talking, nor did he see anything that would indicate a different personality coming out. Dr. Marroquin testified that McSwain's psychiatric records from January 1997 indicate that she told her treating

psychiatrist that "she had been previously diagnosed with multiple personality disorder by "Dr. Miller."

Dr. Marroquin testified that McSwain recounted the events of the murder and made reference "to different personalities coming out and being concerned that she was gonna get killed, . . . that she needed protection, and so on and so forth." Dr. Marroquin opined:

> Well, my conclusion is that this is a way of talking about it after the fact. It's not to say that this is how it actually was at the time. And I think the weight of the information does not support the conclusion that she has a multiple personality disorder, I think this is just after-the-fact rationalization.

Dr. Marroquin noted that McSwain signed prison forms "in which she identified herself by her own name, not someone else's name, not some alleged alter identity." He stated that if someone "is asked their name and identity and responds with their appropriate name and identity, then they seem to know who they are, and I wouldn't make anything more about it than that."

Dr. Marroquin concluded that McSwain was not mentally ill and that she was competent to stand trial when he interviewed her, as well as in 1988. Dr. Marroquin based his conclusion in part on the trial transcripts, which, in his opinion, "did not support the presence of some mental condition that would have prevented her from understanding the nature and object of the charge or rationally assisting counsel." According to Dr. Marroquin, McSwain told him that she had provided defense counsel with names of witnesses to call; Dr. Marroquin believed

this to be significant in the forensic context because it "tells me they were working together." Dr. Marroquin also stated that McSwain told him that she had discussed a plea bargain with her attorney, and that in hindsight, she "thought it was a big mistake" not to enter a plea. Dr. Marroquin testified that when the trial court questioned McSwain regarding her decision not to testify, "she was responsive to being addressed by the Court in what appeared to be an appropriate manner." In Dr. Marroquin's opinion, this was significant because it is not unusual for people with "genuine mental conditions to manifest these conditions in the courtroom, either by speaking up inappropriately or having to be cautioned to remain seated . . . ." He reasoned that, because McSwain did not manifest any conditions of mental illness during the colloquy with the trial court, she was not mentally ill.

> *Q.* If she had been mentally ill at the time of your interview, would you have expected to see something that was remarkable?
>
> *A.* Absolutely.
>
> *Q.* If she had any dissociative disorder of any kind, would you have expected to see something?
>
> *A.* I would expect so, given the amount of time we spent together, yup.

Dr. Marroquin testified that he did not see any indication that McSwain was suffering from a dissociative disorder of any kind. He noted that "people with genuine mental conditions may try to control and disguise them, but if they actually have them, it's very difficult to disguise them for a protracted period of time." He disagreed with the defense expert witnesses that someone with

dissociative identity disorder could appear normal and function in everyday activities such as school and work:

> I think it's very unlikely. I think that this would be a very disabling condition if you really had it. That it would prevent a person from doing most of the things that ordinarily you have to do to live, work, be in relationships, and so on and so forth. I think it would be very difficult to completely keep it under wraps, so that even a layman interacting with the person would not come away from the interaction saying "There's really something the matter with this person."

D. The Trial Court's Opinion

In August 2001, the trial court issued an opinion and order granting McSwain's motion for relief from judgment. The trial court detailed the testimony of each of the witnesses before setting forth its opinion, then stated:

> This court is extremely reluctant to open up once again a murder case that was tried before a jury some eleven years ago. The court fully recognizes the need for finality. Similarly, the court is of the opinion that medical evidence involving psychiatric conditions is not always as objectively reliable as other types of medical testimony. Furthermore, given the offense for which defendant was convicted, and the life sentence with no possibility of parole necessarily imposed following trial, defendant has nothing to lose by bringing this motion, and everything to gain. Defendant could well be scamming the court and the system.
>
> On the other hand, defendant through very competent and diligent counsel presented a

> compelling case that she had and continues to have several distinct personalities. Until hearing the evidence presented, this court would have been very much inclined to dismiss as psycho-babble the claims presented by defendant. In the end, justice and fairness is every bit as important to the system as is finality and convenience. If defendant is scamming the court, she is doing so only after convincing two attorneys, four mental health professionals, and a close friend that she has a mental illness (DID), and that such illness made her incompetent and criminally not responsible at time of the offense and trial in question.

The trial court noted that McSwain had the burden of establishing entitlement to the relief requested pursuant to MCR 6.508(D), and stated that "since defendant's conviction has been appealed and decided adversely to her by both the Michigan Court of Appeals and the Michigan Supreme Court, it is incumbent upon her to demonstrate both good cause for failure to raise these issues on appeal as well as actual prejudice. MCR 6.508(D)(3)(a)&(b)."

The trial court then found that McSwain established good cause for not raising the issue earlier:

> At time of trial, DID was not even a recognized diagnosis. Actual DID is extremely rare, according to the expert witnesses presented. Also, in view of the characteristics of DID, it would have been quite difficult for trial and/or appellate counsel to recognize the potential disability, because relevant personalities likely withdrew at the time for reasons stated by the experts. Even if defendant at times cooperated with counsel, and appropriately

addressed the court about such decisions as turning down an offered plea bargain, there is considerable question as to which personality was speaking or acting at the time.

The trial court also found that McSwain demonstrated actual prejudice from the alleged irregularities that support the claim for relief, pursuant to MCR 6.508(D)(3)(b)(iii):

The actual prejudice requirement presents a more substantial question. There is little doubt from the evidence that one of defendant's personalities or alters killed the victim. The People understandably suggest the likelihood of post-facto fabrication, and even question the validity of a DID diagnosis since such is not uniformly recognized by all mental health professionals. The forensic review performed by the People's expert, Dr. Marroquin, included a more thorough review of the trial record, and other factors normally important in forensic examination. Nonetheless, in hearing the testimony of three mental health professionals presented live by the defense, and in reviewing the information contained in an affidavit of a fourth, and in applying additional evidence presented by lay witnesses, this court is left with a distinct impression that defendant may well not have been competent at time of trial, and perhaps not criminally responsible. Defendant's experts were united in their opinions. Some were preeminent in the field of DID. All suggested that defendant's case was among the most severe they had ever observed. And without questioning the general qualifications of the prosecutor's expert, because he is extremely well-qualified in the field

of forensic psychiatry, his experience and training in the field of DID paled in comparison.

In short, the quality and quantity of expert evidence submitted by defendant, coupled with the strength of the experts' convictions, convinced this otherwise dubious court that had such compelling evidence been presented to the judge and/or jury at time of trial, there is substantial likelihood that defendant would have been declared incompetent, and a reasonable likelihood that the jury would have decided the case differently. In view of this, justice dictates that defendant be given the opportunity to present such evidence at a new trial.

The trial court concluded:

The court recognizes the practical difficulties that could face prosecutors called upon to relitigate a matter some eleven years after the fact. Witnesses disappear, memories fade, and tangible pieces of evidence may no longer be available. Granting of defendant's motion is not something this court takes lightly. In this case, however, evidence appears to remain strong and viable that the person of defendant Rosemary McSwain pulled the trigger that caused the death of the victim. Defendant does not really deny this. The only material issue relates to defendant's alleged DID, and its impact, if any, upon her competency and criminal responsibility. As has been evidenced by this two day hearing, both sides are well able to present and argue their respective positions as needed. Justice dictates that said be done.

II. *MCR 6.508*

A. Overview

It is well settled that Subchapter 6.500 of the Michigan Court Rules establishes the procedures for pursuing postappeal relief from a criminal conviction. The subchapter is the exclusive means to challenge a conviction in Michigan once a defendant has exhausted the normal appellate process. Relief, however, may not be granted unless the defendant demonstrates (a) good cause for failure to have raised the grounds for relief on appeal or in a prior motion under the subchapter and (b) actual prejudice from the alleged irregularities that support the claim for relief. MCR 6.508(D)(3)(a) and (b).[10]

Here, there is little question that McSwain seeks relief from judgment within the scope of MCR 6.500 *et seq.* Further, her central contention in her motion before the trial court for relief from judgment was that she was incompetent to stand trial in 1988 and that she was not available to consult with her attorney and help him prepare a defense. The reason for this, according to McSwain, was that she suffers now, and suffered at the time of trial, from a mental incapacity now known as dissociative identity disorder. While she also asserted that another of her various personalities, apparently "Lucy," actually committed the murder as a form of self-defense, this was not her central contention at the evidentiary hearing, nor is it her central contention in this appeal. Further, the trial court addressed only the incapacity issue in its opinion and therefore it is this

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[10] *People v Watroba*, 193 Mich. App. 124, 126; 483 N.W.2d 441 (1992).

issue, whether viewed under the rubric of newly discovered evidence or simply through the structure of MCR 6.508, that is before us. We take the latter approach and therefore turn first to the language of the court rule.

B. The Language Of MCR 6.508

MCR 6.508 is phrased in the negative and sets out three bars to relief from judgment. The first bar, under MCR 6.508(D)(1), is that a court may not grant relief from judgment if the criminal defendant's motion seeks relief from judgment of conviction and sentence that still is subject is to challenge on appeal under MCR 7.200 or MCR 7.300. This bar is not applicable here; McSwain's judgment of conviction and sentence is not now subject to challenge on appeal pursuant to MCR 7.200 or MCR 7.300.

The second bar, under MCR 6.508(D)(2), is that a court may not grant relief from judgment if the criminal defendant's motion alleges grounds for relief that were decided against the defendant in a prior appeal or proceeding under MCR 6.500, "unless the defendant establishes that a retroactive change in the law has undermined the prior decision." This bar is also not applicable here; McSwain's motion did not allege grounds that were decided against her in a prior appeal or proceeding under MCR 6.500.

The third bar, under MCR 6.508(D)(3), is that a court may not grant relief from judgment if the criminal defendant's motion "alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under" MCR 6.500. This bar clearly applies here as McSwain could have, but did not, raise the issue of her alleged mental

incapacity in her prior appeal from her conviction and sentence. However, a criminal defendant can avoid the application of this bar if that defendant demonstrates:

> (a) good cause for failure to raise such grounds on appeal or in the prior motion; and
>
> (b) actual prejudice from the alleged irregularities that support the claim for relief.[11]

The rule then defines "actual prejudice":

> (i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;[12]
>
> (iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case. . . .[13]

The court rule also provides that the criminal defendant has the burden of establishing entitlement to the relief requested and that the court may waive the "good cause" requirement of MCR 6.508(D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.[14] Here, as we note above, the trial court found that McSwain had demonstrated both "good cause" for failing to raise the mental incapacity ground in her previous appeal and "actual prejudice." The next step in our

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[11] MCR 6.508(D)(3).

[12] MCR 6.508(D)(3)(b).

[13] *Id.*

[14] MCR 6.508(D)(3).

analysis, therefore, is our consideration of the standard against which we review these findings.

III. Standard Of Review

A. Overview

It is well established that we review a trial court's grant of relief from judgment for an abuse of discretion[15] and that we review a trial court's findings of fact supporting its ruling for clear error.[16] These simple statements, however, mask myriad complexities. The first such complexity occurs at the threshold and relates to the proper order in which we are to conduct this bifurcated inquiry. In some instances, statutory language and case precedent set the order; when reviewing a trial court's decision to sentence a minor as a juvenile or as an adult, for example, the appellate court first reviews the trial court's findings of fact for clear error and then reviews the ultimate decision for an abuse of discretion.[17] While there is no similar statutory

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[15] *People v Ulman*, 244 Mich. App. 500, 508; 625 N.W.2d 429 (2001) ("A trial court's grant of relief from judgment is reviewed generally for an abuse of discretion," citing *People v Osaghae*, 460 Mich. 529, 534; 596 N.W.2d 911 (1999) and *People v Reed*, 198 Mich. App. 639, 645; 499 N.W.2d 441 (1993), *aff'd*,449 Mich. 375; 535 N.W.2d 496 (1995)).

[16] *MCR 2.613(C). See also People v Crear*, 242 Mich. App. 158, 167; 618 N.W.2d 91 (2000).

[17] *See People v Thenghkam*, 240 Mich. App. 29, 41-42; 610 N.W.2d 571 (2000), *overruled in part on other grounds in People v Petty*, 469 Mich. 108; 665 N.W.2d 443 (2003). *See also People v Launsburry*, 217 Mich. App. 358, 362; 551 N.W.2d 460 (1996), *People v Lyons (On Remand)*, 203 Mich. App. 465, 468; 513 N.W.2d 170 (1994), and *People v Passeno*, 195 Mich. App. 91, 103; 489 N.W.2d 152 (1992), *overruled in part on other grounds in People v Bigelow*, 229 Mich. App. 218; 581 N.W.2d 744 (1998).

direction when dealing with our review of a trial court's grant of relief from judgment, we believe that simple logic requires us first to consider a trial court's findings of fact and then to consider that court's ultimate decision.

B. Reviewing A Trial Court's Findings Of Facts For Clear Error

The second complexity relates to the "clearly erroneous" standard, one that is "easier to cite than to explain."[18] The classic formulation is that a trial court's findings of fact are clearly erroneous "if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made."[19] This formulation derives from *United States v United States Gypsum Co*,[20] but in that case the United States Supreme Court "did little more than announce the 'firm and definite conviction' slogan without a great deal of elucidation."[21] Nonetheless, in Michigan, we have derived two general principles from *Gypsum*. The first is that reviewing courts give "less deference to the factual findings of trial judges than to the factual findings of juries, even though the trial court's findings still have 'great weight.'"[22] The second is that "a trial court's

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[18] *Thenghkam*, *supra* at 43.

[19] *People v Gistover*, 189 Mich. App. 44, 46; 472 N.W.2d 27 (1991).

[20] *United States v United States Gypsum Co*, 333 U.S. 364; 68 S. Ct. 525; 92 L. Ed. 746 (1948).

[21] *Thenghkam*, *supra* at 44-45.

factual findings may be clearly erroneous even when there is some evidence to support them."[23] As this Court stated in *Thenghkam*:

> There are occasions, albeit relatively infrequent ones, when a trial court's assessment of those facts suffers from some shortsightedness. . . . In those circumstances where the trial court's findings do not accurately portray the factual background of the case, we conclude that the trial court "clearly erred."[24]

Overall, the clear error standard of review is highly deferential to the trial court; indeed, MCR 2.613(C) requires that regard be given to the "special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." However, "the important lesson of *Gypsum* is that appellate courts need not refrain from scrutinizing a trial court's factual findings, nor may appellate courts tacitly endorse obvious errors under the guise of deference."[25]

Thus, here, we must scrutinize the trial court's factual findings and, while according those findings deference as required by the court rule, we are not to tacitly endorse obvious errors, or omissions, under the guise of that deference.

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[22] *Id.* *See also Brady v Michigan Consolidated Gas Co*, 31 Mich. App. 498, 499 n 1; 188 N.W.2d 58 (1971) (Michigan's appellate courts traditionally exercise a broader review of a judge's decision than of jury verdicts).

[23] *Thenghkam*, *supra* at 45.

[24] *Id.* at 46.

[25] *Id.* at 47.

C. Reviewing A Trial Court's Ultimate Decision For An Abuse Of Discretion

The third complexity relates to the abuse of discretion standard. It is, perhaps, helpful to think of this standard as a spectrum. The most deferential end of that spectrum is the formulation contained in *Spalding v Spalding*,[26] which states that an abuse of discretion occurs when the lower court's decision is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." Under this formulation, an appellate court is almost required, in order to reverse a trial judge's discretionary decision, to conclude that the judge literally had taken leave of his senses.

At the other end of the spectrum is the considerably less deferential formulation of the abuse of discretion standard contained in the recent case of *People v Babcock*.[27] There, Justice Markman, writing for the majority, analyzed the abuse of discretion standard:

> At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. *See People v Talley*, 410 Mich. 378, 398; 301 N.W.2d 809 (1981) (Levin, J., concurring), quoting *Langnes v Green*, 282 U.S. 531, 541; 51 S. Ct. 243; 75 L. Ed. 520 (1931) ("'The

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[26] *Spalding v Spalding*, 355 Mich. 382, 384-85; 94 N.W.2d 810 (1959).

[27] *People v Babcock*, 469 Mich. 247, 666 N.W.2d 231 (2003).

term "discretion" denotes the absence of a hard and fast rule.'"). When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes. See *Conoco, Inc v JM Huber Corp*, 289 F.3d 819, 826 (CA Fed, 2002) ("Under an abuse of discretion review, a range of reasonable determinations would survive review."); *United States v Penny*, 60 F.3d 1257, 1265 (CA 7, 1995) ("a court does not abuse its discretion when its decision 'is within the range of options from which one would expect a reasonable trial judge to select'") (citation omitted).[28]

However, *Babcock* interpreted a statute and not a court rule; further, that statute dealt with sentencing. We conclude that if there is to be a decision to expand this formulation of the abuse of discretion standard beyond the statutory context of sentencing, that decision is appropriate for the Supreme Court, and not this Court.

Fortunately, there is a formulation of the abuse of discretion standard that is in the middle of the spectrum. Under this formulation, an abuse of discretion can be found only where "an unprejudiced person, considering the facts on which the trial court [relied], would find no justification or excuse for the

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[28] *Id* at 269.

ruling made."[29] It is this formulation that we consider to be appropriate for our review of the trial court's ultimate decision in this case.

IV. The Trial Court's Findings

A. MCR 6.508(D)(3) Redux

To review briefly, we are concerned here with the third bar to granting relief from judgment contained in MCR 6.508(D)(3). The court rule bars such a grant if the criminal defendant's motion alleges a ground for relief, other than jurisdictional defects, that could have been raised on appeal from the conviction and sentence or in a prior motion under MCR 6.500. However, a criminal defendant can avoid the application of this bar if that defendant satisfies both of the following requirements:

> (a) [a demonstration of] good cause for failure to raise such grounds on appeal or in the prior motion,[30] and
>
> (b) [a demonstration of] actual prejudice from the alleged irregularities that support the claim for relief.[31]

B. Good Cause

As noted above, the trial court found that McSwain established good cause for not earlier raising the issue of her alleged incompetence to stand trial. The trial court's reasoning is fairly thin on this point; essentially, the trial court reasoned that, since

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[29] *People v Williams*, 240 Mich. App. 316, 320; 614 N.W.2d 647 (2000).

[30] MCR 6.508(D)(3)(a).

[31] MCR 6.508(D)(3)(b).

dissociative identity disorder was not a recognized disease at the time of McSwain's trial and since the characteristics of the disease would have made it difficult for trial and appellate counsel to recognize it, good cause existed for not earlier raising the defense of McSwain's incompetence to stand trial. This finding presumes that McSwain had dissociative identity disorder at the time of her trial. In our view, this finding has something of a "now you see it, now you don't" flavor to it. Any convicted criminal can, if the criminal can present evidence of a *current* dissociative identity disorder, claim that such a disorder existed *in the past* but that, because of the characteristics of the disease, it could not be identified. This opens a rather obvious door for claims of incompetence to stand trial that are based on a disease that was both unrecognized and unrecognizable at the time of that trial.

Further, we note that Parker testified that, at the first time he visited McSwain in jail, she was "shy" and "very pleasant." However, Parker then testified that his subsequent meetings with McSwain were "considerably different," because "she was extremely forward, brazen, brassy . . . ." Thus, it could very well be that, contrary to the trial court's conclusion, this case is one in which trial counsel could have, but did not, pick up on a potential insanity defense. This failure cannot be attributed to the fact that dissociative identity disorder was not "a recognized diagnosis," as the trial court put it, in 1988. Although dissociative identity disorder did not exist by that name in 1988, the symptoms that comprise it were then known as multiple personality disorder, which was a well-established diagnosis at that time. Failure to recognize a reasonably discoverable mental

illness is not enough to require a grant of postjudgment relief,[32] especially a number of years later.[33]

It is not necessary for us, however, to determine whether the trial court's factual findings on the good cause requirement were clearly erroneous. While it is certainly possible to reach a firm and definite conclusion that the trial court made a mistake in the way in which it dealt with the good cause requirement, because we determine that McSwain did not meet her burden of demonstrating actual prejudice, we need not reach such a conclusion.

C. Actual Prejudice

1. MCR 6.508(D)(3)(b)(i)

To establish actual prejudice under MCR 6.508(D)(3)(b)(i) McSwain must show that, "but for the alleged error," she "would have had a reasonably likely chance of acquittal . . . ." We conclude that this requires McSwain to show, first, that she had dissociative identity disorder in 1988 and, second, that the jury would have been reasonably likely to acquit her on that basis.

2. MCR 6.508(D)(3)(b)(iii)

Alternatively, McSwain could also establish actual prejudice under MCR 6.508(D)(3)(b)(iii), which states that "actual prejudice" may be established by showing that "the irregularity was so offensive to the

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[32] *See Sellers v State*, 1999 OK CR 6, 973 P.2d 894, 895 (OK App 1999).

[33] *See People v Jackson*, 465 Mich. 390, 399, n 8; 633 N.W.2d 825 (2001) (noting that "long-delayed motions seeking relief from convictions are disfavored").

maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case . . . ." We conclude that, to meet her burden of showing actual prejudice under this definition, McSwain had to demonstrate two things. First, as with the previous definition, she had to demonstrate that she had dissociative identity disorder at the time of her trial in 1988. Second, she had to demonstrate that this condition rendered her incompetent to stand trial. Only if she met *both* requirements could the trial court appropriately find that her conviction should not be allowed to stand because to do so would be "offensive to the maintenance of a sound judicial process . . . ."[34]

3. McSwain's Mental Condition In 1988

a. Direct Evidence

There was precious little direct evidence before the trial court with respect to McSwain's mental condition at the time of her trial in 1988. Thomas Parker, McSwain's trial attorney, was the only person who gave any testimony based on observation of McSwain at that time; interestingly, although McSwain testified, none of her testimony related in any way to her mental condition in 1988. While Parker did state that he got nothing from McSwain to help him fashion his defense strategy and that she simply sat there during the trial, he also admitted that McSwain did not do anything that manifested, or that he believed might be, mental illness. There is, therefore, nothing in the testimony of either Parker or McSwain that the trial court could have

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[34] MCR 6.508(D)(3)(b)(iii).

relied on to make a factual finding that McSwain had any form of mental illness at the time of her trial.

b. Expert Testimony

We are left, then, with the testimony of experts who interviewed McSwain years after she committed the crime for which she was convicted. Much of this testimony concerned McSwain's *current* mental condition, not her mental condition at the time of the trial. With respect to McSwain's mental condition at the time of trial, Dr. Miklashek testified he "would be flabbergasted if this had not been going on since the abuse began, because that's when it always starts. It's a fragmentation of consciousness that occurs at the time of the abuse experience." However, he also stated that he did not ask McSwain in detail about "how far back she remembered being like this." Dr. Miller "extrapolated" back to 1988 and reasoned that because McSwain likely suffered from dissociative identity disorder from childhood, she likely suffered from it at the time of trial. Leslie Pielack testified that if she had correctly diagnosed McSwain with dissociative identity disorder in 1997, the "likelihood is very good" that she had the disease in 1988.

We recognize the difficulty that these experts faced in reaching conclusions about McSwain's mental condition in 1988. We understand that the diagnosis of mental illness is not an exact science and that there is always a certain amount of speculation and, indeed, extrapolation involved in making such diagnoses. Nevertheless, we are constrained to observe that, while the trial court was in the best position to make determinations regarding the *credibility* of these witnesses, the *substance* of their

testimony about McSwain's mental condition in 1988 is less than compelling. Further, while the trial court did reach the conclusion that there was a substantial likelihood that McSwain would have been declared incompetent at the time of trial, it never explicitly and conclusively made a finding that McSwain suffered from dissociative identity disorder in 1988. Finally, the trial court appears to have, at least partially, improperly based its decision on the *number* of the expert witnesses that McSwain presented rather than on the *substance* of the testimony of those witnesses.[35]

For these reasons, we are left with the firm and definite impression that, to the extent that the trial court actually made a decision that McSwain suffered from dissociative identity disorder at the time of her trial, that decision was a mistake. Simply put, there was no direct evidence on which the trial court could have based such a decision, and the opinion testimony of McSwain's experts was at best speculative and at worst after-the-fact extrapolation. Without more, this determination alone compels us to conclude that McSwain failed to establish actual prejudice under either definition.

4. McSwain's Competency To Stand Trial In 1988

a. The Statutory Standard

Even if McSwain had established that she suffered from dissociative identity disorder in 1988, she nonetheless could not have established actual

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[35] *See Horetski v American Sandblast Co*, 340 Mich. 323, 329; 65 N.W.2d 702 (1954) ("The fact that one side presented more witnesses than the other side is not determinative of the weight of the evidence.").

prejudice under MCR 6.508(D)(3)(b)(iii). As noted, to establish actual prejudice under MCR 6.508(D)(3)(b)(iii), McSwain was required to show that dissociative identity disorder made her incompetent to stand trial. In 1988, the standard for competency to stand trial was set forth in MCL 330.2020 which provided:

> (1) A defendant to a criminal charge shall be presumed competent to stand trial. He shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner. The court shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during his trial.
>
> (2) A defendant shall not be determined incompetent to stand trial because psychotropic drugs or other medication have been or are being administered under proper medical direction, and even though without such medication the defendant might be incompetent to stand trial. However, when the defendant is receiving such medication, the court may, prior to making its determination on the issue of incompetence to stand trial, require the filing of a statement by the treating physician that such medication will not adversely affect the defendant's understanding of the proceedings or his ability to assist in his defense.

As stated by the Supreme Court in interpreting this language, a criminal defendant's mental

condition at the time of trial must be such as to assure that he understands the charges against him and can knowingly assist in his defense.[36]

b. Direct Evidence

Again, there was little direct evidence concerning whether, in 1988, McSwain understood the charges against her and could knowingly assist in her defense. The direct evidence that exists does not favor McSwain. Thomas Parker testified that McSwain gave no indication that she did not understand that she was on trial for first-degree murder. With respect to McSwain's decision not to testify, he recalled nothing in the colloquy with the trial court on this subject that would have indicated she did not understand that she had the right to testify. Although Parker testified that McSwain "was of no help" and he "got nothing from her," this was contradicted by Dr. Marroquin's recollection that McSwain told him she had given Parker names of witnesses to call.

c. Expert Testimony

Dr. Miklashek testified that people with dissociative identity disorder can function and finish a class in school, operate in a profession, and make rational decisions. Dr. Miklashek reacted with disdain when asked whether he would need to know the Michigan definition of insanity before making a

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[36] *See People v Wright*, 431 Mich. 282, 285-286; 430 N.W.2d 133 (1988) ("When a defendant's competency to stand trial is questioned, a competency examination is given to determine his mental state at the time of trial to assure that he understands the charges against him and can knowingly assist in his defense."), citing MCL 330.2020.

statement about the clinical functioning of a patient, apparently believing such a definition to be irrelevant. Regarding McSwain's statements at the trial that she understood she had a right to testify on her own behalf, Dr. Miklashek stated that it "[was] an adult person that's sitting there," but opined that "child alters" were occupying McSwain's body at the time of trial, and that "she had very little capacity for social judgment or to understand what was happening to her at that time." However, Dr. Miklashek gave no inkling of how he had reached these rather extraordinary conclusions.

Dr. Miller testified that a person with dissociative identity disorder could be competent to stand trial; indeed, he believed that McSwain was *currently* competent to stand trial. Nevertheless, Dr. Miller testified that it was "very unlikely" that McSwain was competent to stand trial and not legally responsible for the crime she committed, but again, there is little in the record to indicate the basis for this opinion. Leslie Pielack did not testify directly about McSwain's competency to stand trial in 1988; rather, her testimony related only to her belief that if she had diagnosed McSwain correctly in 1997, then the likelihood was very good that she had dissociative identity disorder in 1988.

Again, we recognize the difficulty these experts faced in rendering an opinion about McSwain's competency to stand trial years after that trial took place. However, we find *nothing* in this testimony, whether it is considered individually or cumulatively, on which the trial court could have rationally made a determination that McSwain's mental condition at the time of the 1988 trial was such that she did not

understand the charges against her and could not knowingly assist in her defense. The trial court found that there was a substantial likelihood that McSwain would have been declared incompetent at the time of trial. We are left with the firm and definite conclusion that this finding was a mistake. Simply put, the direct evidence from McSwain's trial counsel indicated otherwise and the opinion testimony of McSwain's experts was purely speculative.

D. Conclusion

To avoid the bar against granting postjudgment relief, a criminal defendant must demonstrate good cause for failure to raise the grounds for such relief on appeal or in the prior motion *and* demonstrate actual prejudice from the alleged irregularities that support the claim for relief. Here, reviewing the trial court's findings of good cause and actual prejudice for clear error, we conclude that we need not reverse trial court's finding of good cause because we conclude that the trial court was mistaken in its findings with regard to actual prejudice. Specifically, we conclude that there was no direct evidence on which the trial court could have based its implicit decision that McSwain suffered from dissociative identity disorder in 1988 and that the opinion testimony of McSwain's experts was at best speculative and at worst after-the-fact extrapolation. Further, we find nothing in the record on which the trial court could have rationally made a determination that McSwain's mental condition in the 1988 trial was such that she did not understand the charges against her and could not knowingly assist in her defense. Overall, we find nothing in the

record that is so offensive to the maintenance of a sound judicial process that McSwain's conviction should not be allowed to stand.

V. Abuse Of Discretion

We have concluded that the trial court's findings with regard to actual prejudice were clearly in error. We must next determine whether, in light of this conclusion, the trial court's ultimate decision to grant a new trial was an abuse of discretion. We are cognizant of the fact that a mere difference in judicial opinion does not establish an abuse of discretion.[37] Nevertheless, we conclude that an unprejudiced person considering the facts on which the trial court relied would find no justification or excuse for the ruling made. By this we do not mean to suggest that the trial court's approach was unprincipled or that the trial court was less than conscientious; indeed, the record reflects careful, serious, and sincere deliberation by the trial court.

In this regard, we note that the trial court ultimately decided that there was a substantial likelihood that McSwain would have been declared incompetent to stand trial in 1988. The trial court based this decision on the testimony of McSwain's experts, who in turn based their determinations not on direct evidence but, rather, on speculation. These factual findings are at the core of the abuse of discretion formulation that we have used in our analysis and they are so clearly erroneous that they cannot provide a justification or excuse for the trial court's ruling.

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[37] *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich. 219, 228; 600 N.W.2d 638 (1999).

On the basis of our analysis of the record before us and the factual findings underpinning the trial court's determination, we find nothing that is so offensive to the maintenance of a sound judicial process that McSwain's conviction should not be allowed to stand.

Reversed.

Smolenski, J., concurred.

/s/ William C. Whitbeck

/s/ Michael R. Smolenski

MURRAY, J. (*concurring*).

I concur with the majority's conclusion that the trial court's order granting defendant's motion for relief from judgment should be reversed. However, in my view the trial court's order should be reversed on the basis that, as a matter of law, good cause did not exist for failing to previously raise this issue. MCR 6.508(D)(3)(a).

As the majority discusses, but does not decide, the record reveals that defendant seeks to present issues at a new trial that are based on facts and law that existed at the time of defendant's trial. For example, defendant's trial counsel testified about various personality traits he encountered while interviewing defendant before trial. The sum and substance of that testimony was that defendant would on one occasion appear shy and reserved, while on another occasion she exhibited a brash and brazen personality. Defendant's trial counsel also testified that, during trial, defendant was essentially emotionless, thus exhibiting another different personality trait. Additionally, case law existed at

the time of trial that recognized multiple personality disorder, now known as disassociative identity disorder. *See, e.g., State v Lockhart*, 208 W. Va. 622, 631-632; 542 S.E.2d 443 (2000), and the cases cited therein.

Because there were facts available to defendant's trial counsel from which he could have argued that defendant was incompetent or acted in self-defense, and because case law existed to support the legal theory behind such an argument, defendant failed to establish the requisite good cause to warrant relief from judgment. MCR 6.508(D)(3)(a); *Sellers v State*, 1995 OK CR 11; 889 P.2d 895, 897 (Okla. App. 1995) (holding that the defendant failed to establish "sufficient reason" to explain why he did not raise an insanity defense based on multiple personality disorder when the disorder, though relatively new at the time of trial, was reasonably discoverable); *Sellers v State*, 1999 OK CR 6, 973 P.2d 894, 895 (Okla. App. 1999) (denying postjudgment relief to the same defendant because the disorder could have been discovered by trial counsel at the time of trial). Indeed, when informed by defendant's current counsel of the diagnosis now given to defendant, her trial counsel testified that it "makes perfect sense in retrospect . . . ." This is a clear indication that it was only the failure to recognize the diagnosis and possible defenses, not the unavailability of them, that caused these issues to not have been previously raised.

Defendant also failed to offer a valid reason explaining why the motion was filed almost ten years after her conviction and more than seven years after her unsuccessful appeal to the Michigan Supreme

Court. Such long-delayed motions are looked on by the courts with disfavor, *People v Jackson*, 465 Mich. 390, 398-399; 633 N.W.2d 825 (2001), a fact the trial court noted. Although defendant asserted that she was presenting newly discovered evidence, as detailed above, the evidence was not newly discovered. Rather, the only difference between the time of trial and the motion for relief from judgment was that defendant found expert witnesses who opined, *based upon the facts existing at the time of trial*, that she suffered from a mental disorder that existed at the time of trial, albeit under a different name. Thus, what this case presents is an argument that the *materiality* of the evidence is newly discovered, which has long been held to be an insufficient basis for the granting of a new trial. See *People v Clark*, 363 Mich. 643, 647; 110 N.W.2d 638 (1961); *People v Stricklin*, 162 Mich. App. 623, 632; 413 N.W.2d 457 (1987).

I would therefore reverse the trial court's order on the basis that defendant failed to establish good cause for failing to raise this ground on appeal or in the prior motion.

/s/ Christopher M. Murray

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF KENT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

ROSEMARIE McSWAIN.

Defendant-Appellant./

File No. 88-45197-FC

Hon. Paul J. Sullivan

OPINION & ORDER.

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Following trial by jury, defendant was convicted of one count of first degree premeditated murder and one count of felony firearm. On October 28, 1988, as required by law, she was sentenced by Circuit Judge Stuart Hoffius to life in prison with no possibility of parole. Her appeal to the Michigan Court of Appeals

and requests for leave to appeal to the Michigan Supreme Court were unsuccessful. Some ten years after the fact, she now seeks new trial by way of post appeal motion for relief from judgment pursuant to MCR 6.501 *et seq.* The stated basis for relief is the allegation that at the time of trial, defendant was incompetent to stand trial due to alleged Dissassociative Identity Disorder ("DID"), previously more commonly referred to as Multiple Personality Disorder. Defendant further alleges that information about defendant's DID was neither available nor discoverable by trial and/or earlier appellate counsel. It is also claimed that defendant may have lacked criminal responsibility due to her DID.

Factually, defendant was a prostitute who shot and killed a john. At this time, the jury's finding that defendant was the shooter is not seriously in doubt. What is questioned by defendant was her competency to stand trial back when she did. Defendant also claims that as a result of her mental illness, she lacked criminal responsibility at the time of the killing. At the hearing, the defense claimed that the mental illness was long standing and due in part to a history of sexual and physical abuse since young childhood. Defendant herself testified about instances of abuse as a child, and pointed to scars on various parts of her body that she claimed were caused by cigarette burns and related instances of abuse.

According to certain of the expert witnesses presented by defendant at the hearing on defendant's motion for post-appeal relief and for new trial, defendant has about seven different alters (personalities) including Lucy, Gemini Dark, Gemini

Light, Rose (Baby Rose), Rose Marie, Marie, and Passion. One of defendant's expert witnesses, Dr. Gregory Miklashek, testified that he would be "flabbergasted" if at least some of these alters did not begin to appear back at age 3 when the abuse began.

In support of the motion, defense presented several witnesses. The testimony of these witnesses is summarized below.

Trial Defense Attorney Thomas Parker

The first witness was Thomas Parker, chief trial attorney for the Office of the Defender. Mr. Parker represented defendant at time of trial. He testified that he has been with the Defender for more than 25 years, and had handled approximately 4000 felony cases. He testified that when he first visited defendant at the jail, she was "pretty, shy, coy, very pleasant," and stated she knew nothing about the case. Subsequent visits, according to Mr. Parker, were quite different. Defendant was "very forward. brazen, brassy" and insistent that she didn't do it, didn't do it."

According to Parker, defendant was of no help in defending the case, and her cooperation was useless. She offered no assistance. During trial, she simply sat there. There was no real interaction between defendant and counsel. She did nothing to indicate whether she did or did not understand. As a result, Parker defended the case simply by attacking the proofs and suggesting possible alternative facts concerning how the shooting occurred.

According to attorney Parker, he is "well-experienced" with clients having mental health problems. At time of trial, defendant did nothing to suggest to him a mental illness, but Parker was quick

to add that his experience primarily involves other types of disorders such as manic depression. He addressed defendant as Rose Marie, and she always responded appropriately. The only alias he recalled was possibly "'Bambi", and defendant never identified herself as Lucy, Passion, or any of the other claimed personalities. To him, defendant appeared to understand she was being tried for first degree murder, and was able to discuss with him the matter of whether or not she should testify, something she elected not to do. In responding to the trial court's questions on her decision not to testify, defendant did not appear confused, and she responded appropriately to the questions.

Parker does not think he or his office has ever handled a case involving DID. The later DID diagnosis "surprised him to a considerable degree," but "seemed reasonable in retrospect."

Friend and Fellow Inmate Debra Carathoni

Ms. Carathoni, while serving a 5-15 year sentence for embezzlement, got to know defendant when both were incarcerated at the Scott Correctional Facility. They knew each other very well, and she observed defendant on a day to day basis in prison. They lived together, went to the same classes together, and were involved in a long term homo-sexual relationship. She met defendant in 1994 and the relationship continued until her release on parole in 1999. She continues to correspond with defendant, but is not permitted to visit due to her felony record.

Ms. Carathoni testified that there was "something peculiar" about defendant's behavior. For example, on a hot summer day defendant might dress in a ball gown with an extravagant hairdo. Defendant would

change both her clothes and her demeanor. After talking about adult things she could become childlike, playing with construction paper and crayons. She would color off the construction paper onto the floor and wall as would a child. When an authority figure would come by, the child-like demeanor would evaporate. The witness knew and accepted defendant's peculiarities.

The witness testified that she could communicate with defendant even when in different personalities and demeanors. Defendant had introduced herself to the witness as Bambi, and that is the only name the witness used with defendant, although defendant would talk about "Gemini Light and Gemini Dark".

Dr. Gregory Miklashek

Dr. Miklashek is a Grand Rapids psychiatrist who has been in practice some 26 years, the last eight of which have been in Michigan, and the last five of which have been in Grand Rapids. Currently, he serves as acting medical director of the trauma unit at Forest View Psychiatric Hospital in Grand Rapids, and he described himself as the resident dissociative expert at Forest View. He further described himself as having "fairly extensive" experience in dissociative disorders. More specifically, he testified that over the past fifteen years of practice he has worked in a conscious, active way with many hundreds of people with dissociative disorders. He described dissociative disorders as covering a spectrum of people "who float outside the body when affected by a traumatic event." He noted that DID is at the extreme end of the spectrum.

Dr. Miklashek testified that defendant does not suffer from "full-blown DID" which would involve

two clearly identified alters with separate names and separate personalities, plus a host, for a total of three personalities. He noted that persons afflicted with DID would have memory problems, where they would literally black out, in the same way an alcoholic would experience blackouts. Such blackouts could extend from hours to months. Perceptual disturbances and thought disorders are to be expected. The alternative personalities ("alters") may or may not have a voice. He further testified that DID persons experiencing DID often report memories of extensive childhood abuse. They are vulnerable to further abuse and commonly are promiscuous, and want to provoke men into being violent. Persons with DID rarely switch personalities in front of someone, and for someone to reveal she is switching requires trust.

Dr. Miklashek reported speaking with defendant on September 23, 2000. He opined that a mere ten minutes was enough time for him to confirm defendant's affliction with DID, but that in view of the attorney request, he did a more extensive review. As previously indicated, he testified that he would be "flabbergasted" if the DID was not ongoing since defendant's abuse began, and he was of the opinion that defendant began suffering from the disorder when she was about three years of age. As earlier noted, he found defendant to have seven different personalities, the more senior of which provided the executive, adult-like functioning. He identified Lucy, age 43, Gemini Dark, age 47, Gemini Light, age 19, Rose (Baby Rose), age 3, Rose Marie, age 16, Maria, age 17, and Passion, age 18.

According to Dr. Miklashek, he was able to get the Lucy alter to come out, and he talked with her. He described Lucy as a carrier of anger and pain, that Lucy is the angry part who "strikes out when necessary", but who does not function at what would be expected to be a 43 year old executive function. He indicated that Bambi was out most of the time, and that the Bambi personality was "quite mature and thoughtful." According to Dr. Miklashek, Bambi was and is a "co-host", who was interviewed most of the time. "To some extent, Bambi is subject to Lucy's control." Mutual respect between Lucy and Bambi has developed over time.

Dr. Miklashek testified that he spoke with defendant about the night of the killing. When pressed for information about same, defendant switched to the Lucy alter. She was tired, hurt, and chaotic. "I thought he was going to kill Rose Marie", said Lucy. She expressed remorse to the victim, his family, and her alters. He described Lucy as a protector of Rose and Gemini Light, as well as Rose Marie. Lucy thought Rose Marie was going to be killed and that she had to protect her life. Bambi described it as a "terrible event."

When asked for his opinion as to why the killing happened, Dr. Miklashek opined that the protective alters stepped in when the child parts of the body were threatened. He also talked to defendant about the trial and pre-trial experiences. During trial, according to the testimony, all of the executive alters retreated, which is typical of an abuse situation, and then the host takes off. Dr. Miklashek testified that Bambi and Lucy have no memory of the trial, and

that he doesn't believe any of the executive personalities knew what was going on.

Under cross examination, Dr. Miklashek acknowledged that it has been twenty years since his last criminal trial, that he interviewed defendant on only one occasion, and that he did not review any trial transcripts, police reports, police history, psychiatric history, or any other reports. He also acknowledged his reliance on patient given history, but defied someone to successfully pretend to be DID given his experience in this field. He acknowledged the need to distinguish DID from malingering, and also that DID sufferers could make rational and critical decisions in some areas. Dr. Miklashek testified that he knew more about DID than any other expert in the state, and that it was common for other psychiatrists to miss the diagnosis.

Interestingly, Dr. Miklashek did not address the ultimate issue as to whether defendant was competent to stand trial or, for that matter, whether she was legally insane. He did opine, however, that he does not believe defendant was malingering, and that in fact she did suffer from DID.

Dr. Steven R. Miller

Dr. Miller is a Wayne County psychologist, and a certified forensic examiner. He has served as a forensic examiner thru the Forensic Center, but also has provided such examinations as part of his own practice which currently is about 95% forensic. He has testified on numerous occasions in the former Recorder's Court in Detroit, and in addition has provided testimony in about 25 different counties. He has testified both for the prosecution and the defense. He acknowledges that in the forensic

setting, there is a tendency to treat DID as a big rationalization. He agrees also that to a large degree mental health professionals must rely upon what a patient/defendant says, and that it is possible that defendant could be faking. He also admitted to having not read the trial transcripts, or police reports.

Notwithstanding the above, Dr. Miller opined that at time of trial it was "highly unlikely" that defendant was competent. His diagnosis was that defendant suffered from DID at time of his exam, and that there was a "very high probability" that she also suffered from DID from childhood on, including at the time of the offense. He acknowledged that it would have been more helpful to have conducted his exam at time of trial. Nonetheless, he testified to having "very little doubt" that DID was a correct diagnosis. He opined that defendant at time of trial was unable to understand the nature of the proceedings against her, or to render reasonable assistance to her attorney. He also opined that at time of the killing, defendant was likely to have been affected by mental illness, which DID is. He testified that mental illness involved a substantial disorder of thought and mind, which impaired defendant's judgment, perception and ability to think. According to Dr. Miller, such illness substantially impaired defendant such that she could not appreciate the nature and quality of what she was doing, or conform her acts to the law. In short, Dr. Miller was of the opinion that at time of the killing, defendant was legally insane.

Dr. Miller indicated that his diagnosis and opinion were arrived at after meeting defendant three times for approximately two hours each time. In taking his

history from defendant, he indicated that the incident was described by two distinct personalities. He talked about some of the same personalities/alters described by Dr. Miklashek, and himself described "Passion" as the sexual person, "Lucy" as the hard, tough, angry, street-wise person, "Rose Marie" as the passive, depressed, suicidal teen, and "Bambi" as the slick prostitute. He also noted that in his opinion, most clinicians lack adequate awareness to make a proper diagnosis of DID, and agreed with Dr. Miklashek that the DID diagnosis where appropriate is often overlooked.

Clinical Psychotherapist Leslie Pielack

Defendant's last expert witness presented in person at time of the hearing was clinical psychotherapist Leslie Pielack. She specializes in trauma related disorders, and has been practicing for about 20 years. This was her first experience being a witness in court.

Ms. Pielack relied heavily upon history as provided by defendant, but also administered tests and made clinical observations supporting her findings. She described defendant's early life as having been very chaotic and abusive. She agreed with the above witnesses that some within the profession question the existence of DID. Nonetheless, she opined not only that defendant has been suffering from DID since early childhood, but also that her DID impairment was "severe". In fact, defendant scored 67.5 out of 100 on the so-called Dissociative Experience Scale" ("DES"). Ms. Pielack testified that a score of 30 or above suggests the need for additional tests, and scores by themselves are not conclusive.

She observed, however, that defendant's score of 67.5 was about the highest she had ever seen.

Dr. Arthur Marroquin

The People called Dr. Arthur Marroquin, a doctor of clinical psychology, who has been employed with the Center for Forensic Psychiatry since April 1983. Currently, Dr. Marroquin serves as Assistant Director of the Evaluation Unit. Dr. Marroquin also maintains a clinical practice, during which he had involvement with only one DID case. He has testified approximately 400 times in court, but acknowledged no specialization in DID.

In preparing for his testimony, and in arriving at his opinion, Dr. Marroquin reviewed police reports, trial transcripts, and records of psychiatric treatments involving defendant. He indicated that a proper forensic examination requires multiple sources of information.

On the issue of competency to stand trial, Dr. Marroquin reviewed the record for indications of disturbance of control, interchanges with the court, and indications of cooperation between defendant and her attorney. On the issue of criminal responsibility, he examined defendant's demeanor at time of the offense, her own narrative, sequence of events, and psychiatric history. He administered a battery of psychological tests including Weschler IQ, MMPI, and Validity Index Profile (VIP). He observed defendant at the Center for Forensic Psychiatry branch located at the Scott Correctional Facility where defendant was being held. He noted that defendant's appearance and demeanor were unremarkable, that she was groomed and clean, that she looked her age, and that she was otherwise

unremarkable in presentation and demeanor. Defendant was oriented as to person, time and place. She was not hearing voices. She reported insomnia, sometimes associated with depression, appropriate eating habits, and no weight fluctuations. She was concerned about her legal issues, but was not suicidal. Dr. Marroquin did not observe any different personalities. Ultimately, he opined that defendant was competent at time of trial, and at time of his interview with her, that she was not mentally ill. He based his opinions upon defendant's own narrative, the trial transcript demonstrating defendant's ability to work with her attorney, and records from the Kent County Jail which failed to support indication of non-competency.

Dr. Marroquin testified that he observed no manifestation of any dissociative disorder, which he would have expected had defendant been suffering from same. He noted the absence of any indication of dissociative disorders in prior mental health records, such as when defendant was hospitalized at age 13 for five months at Pine Rest Hospital, a local mental health facility. He looked for and found no manifestation of multiple personality disorders during any of her prior incarcerations. Her notes to other inmates, and her kites to administrators were all unremarkable.

Dr. Marroquin spent in excess of six hours with defendant, with no indication of dissociative disorders. He believes there should have been some indication during that time if she suffered from it. He agreed that DID can be a very disabling condition., where even a layman would likely have some indication of its presence. He also agreed that

someone suffering from DID would likely be unable to cooperate appropriately with his or her lawyer. He stated that DID is very rare, whereas dissociative disorders are quite common. He opined that defendant's report of alters was little more than after the fact rationalization.

Defendant Rosemary McSwain

Defendant herself testified about her abusive childhood, and answered questions about two exhibits she had written to her attorney in the course of the hearing on this motion. Exhibit A was written on October 2, 2000, and Exhibit B on October 3, the second day of the hearing. The handwriting on the two notes is totally different as to penmanship, and somewhat different as to method of expression. In the absence of intentional deception, the exhibits would be indicative of different personalities. Deception, however, cannot be ruled out.

Dr. Irwin Adelson

Dr. Adelson did not present in person testimony. However, defendant submitted an affidavit and extensive report outlining Dr. Adelson's opinion that defendant was affected by DID at the time of the killing. Dr. Adelson's credentials appeared to be significant in the area of DID, and his report was compelling. In fairness to the people, however, no opportunity was available to cross examine or challenge the author, his findings, his expertise and experience, etc. The court is reluctant to give Dr. Adelson's report much significance in view of the method by which it was submitted. Nonetheless, it was entirely consistent with the findings of defendant's three other expert witnesses who testified live.

OPINION OF THE COURT

This court is extremely reluctant to open up once again a murder case that was tried before a jury some eleven years ago. The court fully recognizes the need for finality. Similarly, the court is of the opinion that medical evidence involving psychiatric conditions is not always as objectively reliable as other types of medical testimony. Furthermore, given the offense for which defendant was convicted, and the life sentence with no possibility of parole necessarily imposed following trial, defendant has nothing to lose by bringing this motion, and everything to gain. Defendant could well be scamming the court and the system.

On the other hand, defendant through very competent and diligent counsel presented a compelling case that she had and continues to have several distinct personalities. Until hearing the evidence presented, this court would have been very much inclined to dismiss as psycho-babble the claims presented by defendant. In the end, justice and fairness is every bit as important to the system as is finality and convenience. If defendant is scamming the court, she is doing so only after convincing two attorneys, four mental health professionals, and a close friend that she has a mental illness (DID), and that such illness made her incompetent and criminally not responsible at time of the offense and trial in question.

This court agrees with the prosecuting attorney that the provisions of MCR 6.500 et seq govern this motion, even though defendant's conviction predated the effective date of said rule. *See, e.g., People v.*

Reed, 449 Mich. 375 (1995). Therefore, pursuant to MCR 6.508(D), the burden is on defendant to establish entitlement to relief. Also, since defendant's conviction has been appealed and decided adversely to her by both the Michigan Court of Appeals and the Michigan Supreme Court, it is incumbent upon her to demonstrate both good cause for failure to raise these issues on appeal as well as actual prejudice. MCR 6.508(D)(3)(a)&(b).

Defendant has established good cause for not raising this issue earlier. At time of trial, DID was not even a recognized diagnosis. Actual DID is extremely rare, according to the expert witnesses presented. Also, in view of the characteristics of DID, it would have been quite difficult for trial and/or appellate counsel to recognize the potential disability, because relevant personalities likely withdrew at the time for reasons stated by the experts. Even if defendant at times cooperated with counsel, and appropriately addressed the court about such decisions as turning down an offered plea bargain, there is considerable question as to which personality was speaking or acting at the time.

The actual prejudice requirement presents a more substantial question. There is little doubt from the evidence that one of defendant's personalities or alters killed the victim. The People understandably suggest the likelihood of post-facto fabrication, and even question the validity of a DID diagnosis since such is not uniformly recognized by all mental health professionals. The forensic review performed by the People's expert, Dr. Marroquin, included a more thorough review of the trial record, and other factors normally important in forensic examinations.

Nonetheless, in hearing the testimony of three mental health professionals presented live by the defense, and in reviewing the information contained in an affidavit of a fourth, and in applying additional evidence presented by lay witnesses, this court is left with a distinct impression that defendant may well not have been competent at time of trial, and perhaps not criminally responsible. Defendant's experts were united in their opinions. Some were preeminent in the field of DID. All suggested that defendant's case was among the most severe they had ever observed. And without questioning the general qualifications of the prosecutor's expert, because he is extremely well-qualified in the field of forensic psychiatry, his experience and training in the field of DID paled in comparison.

In short, the quality and quantity of expert evidence submitted by defendant, coupled with the strength of the experts' convictions, convinced this otherwise dubious court that had such compelling evidence been presented to the judge and/or jury at time of trial, there is substantial likelihood that defendant would have been declared incompetent, and a reasonable likelihood that the jury would have decided the case differently. In view of this, justice dictates that defendant be given the opportunity to present such evidence at a new trial.

The court recognizes the practical difficulties that could face prosecutors called upon to relitigate a matter some eleven years after the fact. Witnesses disappear, memories fade, and tangible pieces of evidence may no longer be available. Granting of defendant's motion is not something this court takes lightly. In this case, however, evidence appears to

remain strong and viable that the person of defendant Rosemary McSwain pulled the trigger that caused the death of the victim. Defendant does not really deny this. The only material issue relates to defendants alleged DID, and its impact, if any, upon her competency and criminal responsibility. As has been evidenced by this two day hearing, both sides are well able to present and argue their respective positions as needed. Justice dictates that said be done.

For all of the above reasons, defendant's Motion for Post Trial Relief (for new trial) ought be and hereby is GRANTED.

DATED: August 21, 2001

/s/ Paul J. Sullivan
Paul J. Sullivan, Circuit Judge (P24139)

SUPREME COURT OF MICHIGAN

SC No. 90408

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

ROSE McSWAIN,
Defendant-Appellant

June 28, 1991, Entered

JUDGES: Michael F. Cavanagh, Chief Justice, Charles L. Levin, James H. Brickley, Patricia J. Boyle, Dorothy Comstock Riley, Robert P. Griffin, Conrad L. Mallett, Jr., Associate Justices.

Order

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v.
ROSE McSWAIN,
Defendant-Appellant.

Oct. 08 1990
No. 115067

Before: Maher, P.J., and Sullivan and Reilly, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), for the shooting death of Rafael Alvarado. Defendant was sentenced to life imprisonment without parole for the murder conviction and to a consecutive two year term for the felony-firearm conviction. She now appeals as of right. We affirm.

On or about Friday, October 7, 1988, ten days before the start of trial, an attorney representing Jackie Borden contacted the police and told them that his client might have additional information regarding defendant's involvement in the murder of Alvarado. Borden was a previously endorsed witness who exchanged written notes with defendant during their confinement in separate cellblocks at the Kent County Jail. Defendant allegedly admitted her involvement in the murder to Borden and had asked Borden to perjure herself at trial. Borden later told the police to speak with defendant's cellmates

(Carmen Williams, Sequita Eaves and Linda Nusbaum) for further details.

On Friday, October 14, 1988, three days before the start of trial, the police provided the prosecution with written statements taken from defendant's cellmates which implicated defendant in the murder of Alvarado. In her statement, Williams said that defendant admitted killing Alvarado. Eaves and Nusbaum stated that they had overheard defendant's conversation with Williams. That same day, at approximately 8:00 a.m., the prosecutor delivered copies of the statements to defense counsel's office. The prosecutor also contacted defense counsel by telephone and advised him of the new evidence. That evening, defense counsel went to the jail to speak with Williams, Eaves and Nusbaum. Williams refused to speak with defense counsel because her attorney was not present. Eaves and Nusbaum had a brief conversation with counsel, the substance of which is not clear from the record.

On Monday, October 17, 1988, the first day of trial, defendant moved for a continuance on the basis that additional time was needed to: (1) interview defendant's cellmates; (2) determine whether defendant's cellmates had been given any consideration for their statements and testimony; and (3) determine whether Borden had conspired with defendant's cellmates to implicate defendant in the murder. In response, the prosecutor stated that the cellmates were not given anything in exchange for their cooperation and that he would assist defense counsel in locating any additional witnesses. The trial court subsequently denied defendant's request for a continuance and added that defense counsel

would be given an additional opportunity to interview defendant's cellmates before they testified at trial. The court also stated that defendant should be given the full help of the police department and the prosecutor's office in getting any needed information.

Eaves testified on October 20, 1988, Williams and Nusbaum testified on October 24, 1988, ten days after defense counsel was initially notified of their endorsement as witnesses and seven days after the start of trial. Defendant counsel was given an additional opportunity to interview each of these witnesses before they testified.

I

Defendant first contends that the trial court abused its discretion in denying defendant's motion for a continuance of trial. We disagree.

The grant or denial of a continuance is committed to the discretion of the trial court and will not be reversed by this Court on appeal absent an abuse of discretion. *People v. Gross*, 118 Mich App 161; 324 N.W.2d 557 (1982). Adjournments or continuances are not to be granted absent a strong showing of good cause. MCL 768.2; MSA 28.1025. In reviewing the trial court's ruling on this issue, this Court considers: (1) whether defendant is asserting a constitutional right; (2) whether there is a legitimate reason for asserting the right; (3) whether defendant is guilty of negligence; (4) whether prior adjournments occurred at defendant's request; and (5) whether defendant has demonstrated that she was prejudiced. *People v. Charles O. Williams*, 386 Mich 565; 194 N.W.2d 337 (1972); *People v. Wilson*, 397 Mich 76, 81; 243 N.W.2d 257 (1976) reh. den. 397 Mich 962 (1976).

Initially, defendant properly contends that she is asserting her constitutional right to effective assistance of counsel. *People v. Bell*, 155 Mich App 408, 413; 399 N.W.2d 542 (1986). Having carefully reviewed the trial transcripts, however, we are not convinced that the trial court's denial of defendant's request for a continuance inhibited defendant's right to effective counsel or inhibited her ability to present a defense. Defense counsel intensively cross-examined each of the newly endorsed witnesses and presented four rebuttal witnesses in an attempt to impeach their credibility. See *People v. Meadows*, 80 Mich App 680, 690, 263 N.W.2d 903 (1977); *People v. Umerska*, 94 Mich App 799, 289 N.W.2d 858 (1980).

Turning to the second *Williams* factor, we are not sure what, if anything, a continuance would have accomplished in this case. The prosecutor, in no uncertain terms, stated that the witnesses had not been given any type of consideration in exchange for their statements or testimony against defendant at trial. Each of the witnesses corroborated the prosecutor's statement during trial. In addition, defense counsel was given opportunities to interview the witnesses but they refused to speak with him. Defendant cites no law which suggests that a witness must speak with counsel for a defendant. Finally, defendant had at *least* six days in which to prepare for the witnesses' testimony. Under these circumstances, we are not persuaded that defendant was prejudiced or that the trial court abused its discretion in denying defendant's request for a continuance.

II

Defendant also contends that the trial court committed error requiring reversal by refusing to allow defendant to examine Williams' attorney and Borden's attorney to determine whether these witnesses received any consideration from the prosecutor for their testimony. Defendant specifically contends that Williams and Borden waived the attorney-client privilege by testifying at trial. We disagree.

Defendant's reliance on *People v. Bortnik*, 28 Mich App 198; 184 N.W.2d 275 (1970), is misplaced. In *Bortnick*, another panel of this Court held: "When an *accomplice* testifies on behalf of the state and implicates a third person, he waives any and all privileges." *Bortnik*, *supra* at 200 (emphasis added). However, in this case, neither Williams nor Borden were alleged to have been an accomplice of defendant. In addition, the police, the prosecutor and the witnesses themselves denied that any considered was offered in exchange for the witnesses' testimony. Under these circumstances, we cannot conclude that the trial court erred in ruling that the privilege was not waived. *See also People v. Buschard (On Remand)*, 129 Mich App 160; 341 N.W.2d 260 (1983).

III

Defendant next contends that she was denied a fair trial due to several instances of prosecutorial misconduct. We have reviewed each alleged instance of prosecutorial misconduct and conclude that defendant was not denied a fair and impartial trial because any perceived prejudice: (1) could have been cured by a timely objection, either by precluding further questioning or by obtaining an appropriate

cautionary instruction; (2) was cured by a cautionary instruction; (3) was harmless in light of the trial court's clear and unequivocal instructions that defendant had an "absolute right not to testify" and that the jury was "not permitted to consider her silence in [their] deliberations"; and (4) the prosecutor's comment regarding a statement made by defendant to her boyfriend was a reasonable inference from the evidence introduced at trial. *People v. Simon*, 174 Mich App 649, 655; 436 N.W.2d 695 (1989); *People v. Badour*, 167 Mich App 186, 197; 421 N.W.2d 624 (1988), *rev'd on other grounds* 434 Mich 691 (1990); *People v. Roberson*, 167 Mich App 501, 509; 423 N.W.2d 245 (1988).

IV

Defendant further contends that the trial court committed error requiring reversal in refusing to voir dire the jurors in order to determine if they were unable to render a fair and impartial verdict after District Judge Carol Irons was killed in the same building during the third day of trial. We begin by noting that the trial judge did voir dire the only juror who showed adverse effects from the shooting. The juror, however, believed that she was capable of rendering a fair and impartial verdict. As to the remaining jurors, defendant has not shown that she was actually prejudiced by the trial court's failure to voir dire them. We therefore conclude that the trial court did not clearly abuse its discretion. *See People v. Johnson*, 164 Mich App 634, 637-638; 418 N.W.2d 117 (1987).

V

Defendant next contends that the trial court committed error requiring reversal in admitting the

hearsay testimony of Nusbaum concerning a conversation between Williams and defendant. We disagree but for reasons other than those stated by the trial court.

Hearsay is defined as an out-of-court statement offered in evidence to prove the truth of the matter asserted. MRE 801. Contrary to the trial court's ruling, there is no exception allowing the admission of hearsay statements because such statements were made in the presence of defendant. *See People v. Cunningham*, 398 Mich 514, 521-522; 248 N.W.2d 166 (1976) (Kavanagh, C.J.). Nevertheless, the testimony of Nusbaum was not hearsay in that it was not an assertion offered to prove the truth of the matter asserted. By introducing the statements, the prosecution was merely attempting to show that a conversation occurred between defendant and Williams. Moreover, the statements made by defendant, as repeated by Nusbaum, were admissible under MRE 801(d)(2). The trial court did not err in admitting such statements into evidence.

VI

We finally reject defendant's argument that the trial court committed error requiring reversal in declining defendant's request to give CJI 4:2:02 (now CJI 2d 4.3), "Mixed Direct and Circumstantial Evidence." Defendant's failure to request the instruction before the jury retired to consider its verdict waives appellate review of this issue. *People v. Barnett*, 165 Mich App 311, 317-318; 418 N.W.2d 445 (1987); MCR 2.516(C).

Affirmed.

/s/ Richard M. Maher
/s/ Joseph B. Sullivan
/s/ Maureen Pulte Reilly

No. 06-1920

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROSE MCSWAIN,	)	FILED
	)	Oct 30, 2008
	)	Leonard Green,
	)	Clerk
Petitioner-Appellant,	)	
	)	
v.	)	ORDER
	)	
SUSAN DAVIS, WARDEN,	)	
	)	
	)	
	)	
Respondent-Appellee.	)	
	)	

BEFORE: SUHRHEINRICH and ROGERS, Circuit Judges; and BELL,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active** judges of this court, and no judge of this court having requested a vote on the suggestion for

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* Hon. Robert Holmes Bell, United States District Judge for the Western District of Michigan, sitting by designation.

** Judge Sutton recused himself from participation in this ruling.

rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/Leonard Green

Leonard Green
Clerk

UNITED STATES CODE

Title 28. Judiciary and Judicial Procedure

Part VI. Particular Proceedings

Chapter 153. Habeas Corpus

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless-

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

APPLICATION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY

United States District Court	Eastern District of Michigan	
Name: Rosemarie McSwain	Inmate Number: 197760	Case Number (official use only)
Place of Incarceration: Huron Valley Complex/Women's		
Name of Petitioner (Include the name under which you were incarcerated Name of Respondent (authorized person having custody over you) ROSEMARIE McSWAIN vs. SUSAN DAVIS		
The Attorney General of the State of: Michigan		

PETITION

1. Name and location of court which entered the judgement of conviction under attack: Kent County Circuit Court, 17th Judicial Circuit

2. Date of Judgment of conviction: December 8, 1988

3. Length of Sentence: 2 years. Life without parole.

JUDGE: Rosen, Gerald E.
DECK: Judge Prisoner Deck
DATE: 09/15/2005 @ 14:30:40
CASE NUMBER: 2:05cv73545

HC ROSEMARIE MCSWAIN #197760 vs. SUSAN DAVIS

(LE)

4. Nature of offense involved (all counts):
Felony firearm, MCL 750.227BA
First Degree Felony Murder, MCL 750.316

MAGISTRATE JUDGE PEPE

5. What was your plea? (check one)

(a) Not guilty ☒
(b) Guilty ☐
(c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: N/A

6. If you pleaded not guilty, what kind of trial did you have? (check one)
(a) Jury ☒
(b) Judge ☐

7. Did you testify at the trial?
Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?
Yes ☒ No ☐

9. If you did appeal, answer the following:
(a) Name of Court: Michigan Court of Appeals
(b) Result: denied
(c) Date of result and citation, if known: unknown
(d) Grounds raised: unkown (sic)

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court: unknown

(2) Result: _____

(3) Date of result and citation, if known: _____

(4) Grounds raised: _____

(f) If you filed a petition for certiorari in the United States Supreme court, please answer the following with respect to each direct appeal:

(1) Name of court: N/A/

(2) Result: _____

(3) Date of result and citation, if known: _____

(4) Grounds raised: _____

10. Other than a direct appeal from judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ☒ No ☐

11. If your answer to 10 was "yes", give the following information:

(a) (1) Name of court: Kent County Circuit Court

(2) Nature of proceeding: MCL 6.500 Motion,

(3) Grounds raised: Defendant was tried and sentenced even though she was incompetent, due to dissociative identity

disorder, in violation of her federal and state constitutional rights to due process and assistance of counsel, US CONST, AMS V, IV, XIV, CONST 1963, AM 1, SECS 17, 20

(4) Did you receive an evidentiary hearing on your petition, application, or motion?
Yes ☒ No ☐

(b) As to any second petition, application, or motion give the same information:
(1) Name of court: N/A
(2) Nature of proceeding: _____
(3) Grounds raised: _____
(4) Did you receive an evidentiary hearing on your petition, application, or motion?
Yes ☐ No ☐

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?
(1) First petition, etc. Yes ☒ No ☐
(2) Section petition, etc. Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application, or motion explain briefly why you did not: N/A

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If

necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by the use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutional selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

(A) Ground one: Defendant was incompetent at the time of her trial and sentence due to dissociative identity disorder, in violation of her federal and state constitutional rights to due process and assistance of counsel. US CONST, AMS V, VI, XIV, CONST 1963, AM 1, SECS 17, 20.

Supporting FACTS (tell your story *briefly* without citing cases or law: Per Judge Sullivan's Order, dated August 21, 2001, the quality and quantity of expert evidence submitted by defendant, coupled with the strength of the experts' convictions, convinced this otherwise dubious court that

that (sic) had such compelling evidence been presented to the judge/jury at the time of trial, there is substantial likelihood that defendant would have been declared incompetent, and a reasonable likelihood that the jury would have decided the case differently. In view of this, justice dictates that defendant be given the opportunity to present such evidence at a new trial.

(B) Ground two: N/A

Supporting FACTS (tell your story *briefly* without citing case or law:

(C) Ground three: N/A

Supporting FACTS (tell your story *briefly* without citing case or law:

(D) Ground four: N/A/

Supporting FACTS (tell your story *briefly* without citing case or law:

(13) If any of the grounds listed in 12 A, B, C, and D were not previously presented in any other court, state or federal, state briefly what

grounds were not so presented, and give your reasons for not presenting them:
N.A.

(14) Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☒

(15) Give the name and address, if known, of each attorney who represented you in the following states of the judgment attacked herein:

1. At preliminary hearing: Thomas C. Parker, Kent County Defender's Office, 920 McKay Tower, Grand Rapids, MI 49503
2. At arraignment and plea: Thomas C. Parker.
3. At trial:
Thomas C. Parker.
4. At sentencing: Thomas C. Parker.
5. On appeal: unknown
6. In any post-conviction proceeding: Jeanice Dagher-Margosian, 3300 Washtenaw, Ste 290, PO Box 2016, Ann Arbor, MI 48106
7. On appeal from any adverse ruling in a post-conviction proceeding: John L. Grace III, 125 Ottawa, NW, Ste 250, Grand Rapids, MI 49503

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?
Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☒

1. If yes, give name and location of court which imposed sentence to be served in the future:
N/A

2. Give date and length of the above sentence:
N/A

3. Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☒

Wherefore, Movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

/s/ John L. Grace III
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

9/14/05
Date

/s/ John L. Grace III for
Rosemarie McSwain
Signature of Movant

/s/ Donna M. Meeks
Donna M. Meeks
NOTARY PUBLIC KENT CO.
MY COMMISSION EXPIRES Nov 21, 2006

AA0241 (Rev. 3/00)

CIVIL COVER SHEET FOR PRISONER CASES

Name of 1st Listed Plaintiff Rosemarie McSwain	Name of 1st Listed Defendant Susan Davis
Inmate Number: 197760	Defendant's County of Residence (if located in Michigan) Washtenaw

FACILITIES, LISTED ALPHABETICALLY

[Excerpted here; only the checked facility is reproduced below]

HURON VALLEY CENTER
3511 BEMIS ROAD
YPSILANTI, MI 48197
WASHTENAW COUNTY

JUDGE: Rosen, Gerald E.
DECK: Judge Prisoner Deck
DATE: 9/15/2005 @ 14:30:40
CASE NUMBER: 2:05CV73545
HC ROSEMARIE MCSWAIN #197760 VS SUSAN DAVIS (LE)

MAGISTRATE JUDGE PEPE

OFFICE USE ONLY

PLAINTIFF ADDRESS: (IF NOT ABOVE)
BASIS OF JURISDICTION
☐ 2 US GOVERNMENT DEFENDANT
☒ 3 FEDERAL QUESTION
☐ 4 DIVERSITY
ORIGIN
☒ 1 ORIGINAL PROCEEDING
☐ 2 REMOVED FROM STATE COURT

☐ 5 TRANSFERRED FROM ANOTHER DISTRICT COURT

FEE STATUS

☐ IFP IN FORMA PAUPERIS
☐ WAI WAIVED
☒ PD PAID

PLAINTIFF'S COUNTY OF RESIDENCE

Washtenaw

NATURE OF SUIT

☐ 510 MOTION TO VACATE
☒ 530 HABEAS CORPUS
☐ 535 HABEAS/DEATH PENALTY
☐ 540 MANDAMUS
☐ 550 CIVIL RIGHTS
☐ PRISON CONDITIONS

JURY DEMAND

CHECK YES ONLY IF DEMANDED IN COMPLAINT

☒ NO
☐ YES

CASE OPENING

☒ OPEN AS CV
☐ NO CREDIT REASSIGN TO (MOTION TO VACATE – 2255)

PURSUANT TO LOCAL RULE 83.11

1. Is this a case that has been previously discontinued or dismissed?
Yes ☐ No ☒

If yes, give the following information:
Court: _____
Case Number: _____
Judge: _____

2. Other than stated above, are there any pending or previously discontinued or dismissed companion cases in this or any other court, including state court? *(Companion cases are matters in which it appears substantially similar evidence will be offered or the same or related parties are present and the cases arise out of the same transaction or occurrence.)*
Yes ☐ No ☒

If yes, give the following information:
Court: _____
Case Number: _____
Judge: _____

_____

Notes:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROSEMARIE McSWAIN,

Petitioner,

V.

SUSAN DAVIS,

Respondent.

_____/

CASE NO. 05-CV-73545-DT
HONORABLE GERALD E. ROSEN
UNITED STATES DISTRICT JUDGE
HONORABLE STEVEN D. PEPE
UNITED STATES MAGISTRATE JUDGE

ROSEMARIE McSWAIN,
#197760
Huron Valley Complex/Women's
3511 Bemis Road
Ypsilanti, MI 48197

MICHAEL A. COX
Attorney General

Laura A. Cook (P44718)
Assistant Attorney General
Attorney for Respondent
Appellate Division
P.O. Box 30217
Lansing, MI 48913

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO COMPLY WITH THE STATUTE OF LIMITATIONS AND BRIEF IN SUPPORT

The respondent asserts the petitioner's application for habeas corpus should be dismissed, on its face, for

failure to comply with the applicable one-year state of limitations. Respondent further asserts the petitioner failed to assert any other limitations period should apply, nor asserted or supported any equitable tolling grounds. Because petitioner's pro se application was prepared by an attorney, John L. Grace III, petitioner believed she was properly before the court and maintained this belief until she received the respondent's motion to dismiss. The petitioner is presently being assisted by a Law Library Clerk.

BRIEF

The issue petitioner raises is "newly discovered" as of 1997 through 1998. The respondent seeks to ignore the circumstances of petitioner's case and apply the limitations period set by our Sixth Circuit in *McLendon v. Sherman*, 329 F.3d 490, 494-495 (CA 6, 2003), which expires one-year after the effective date of AEDPA 2244(d)(1). Petitioner asserts this should not apply to her, but rather, AEDPA 2244(d)(2). AEDPA 224(d)(2) provides that the time during which a properly filed state post-conviction petition is pending does not count toward any period of limitations. *Bronnaugh v. Ohio*, 235 F.3d 280, 283 (6th Cir. 2000); however, in 1997, the petitioner's competency was being evaluated and it was at the conclusion of these evaluations, newly discovered evidence came to light, the petitioner was diagnosed with a mental disorder which now placed her competency in issue. Shortly thereafter, post-conviction proceedings were underway. The last state court ruling on this issue was September 16, 2004 and a timely habeas corpus petition was filed on September 15, 2005.

The federal courts will not review a habeas petition where the state prisoner has not first presented her claims to the state courts and exhausted all state court remedies available to her. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994).

In the alternative, the petitioner seeks "equitable tolling." Although it is now years after the original conviction in this case, the claim of incompetency may still be made, as it has only been recently discovered. Petitioner was evaluated various times in 1997, (see appendix) by different experts in the field, resulting in conclusive findings by 1998, with petitioner being diagnosed as having **MPD-Multiple Personality Disorder/DID–Disassociative–Identity Disorder**. The findings indicate, the petitioner has been suffering with the illness since childhood and was likely, incompetent to stand trial; however, no competency evaluation was done on this petitioner prior to standing trial in 1988.

A hearing on competency is constitutionally compelled once there is substantial evidence that the defendant may be incompetent. *Pate v. Robinson*, 86 S Ct 836 (1966). Evidence is substantial if it raised a reasonable doubt about the defendant's competency to stand trial. Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence. *Moore v. US*, 464 F.2d 663 (9th Cir. 1972). The findings of the experts who evaluated petitioner provides evidence which, at the very least, raises doubt, petitioner was competent to stand trial.

Mental incapacity of the petitioner can warrant the equitable tolling of the statute of limitations. *Cantrell v. Knoxville Cmty. Dev. Corp.*, 60 F.3d 1177,

1179-1180 (6th Cir. 1995). The petitioner must make a threshold showing of incompetence. *Calderon v. United States Dist. Court for Cent. Dist. Of Cal.*, 163 F.3d 530, 541 (9th Cir. 1998) and demonstrate that the alleged incompetence affected her ability to file a timely habeas petition. *Nara v. Frank*, 264 F.3d 310, 320 (3rd Cir. 2001). A threshold showing of incompetence is demonstrated in the findings of the experts appended and because these findings indicate the petitioner has been suffering with this mental deficit since childhood, petitioner likely suffers periods of incompetency which would effect her ability to file a timely habeas petition.

The Sixth Circuit has recognized that the doctrine of equitable tolling applies to the one-year limitation period for habeas corpus petitions. *Dunlap v United States*, 250 F.3d 1001, 1003 (6th Cir. 2001). "The federal courts sparingly bestow equitable tolling. Typically, equitable tolling applies only when a litigant's failure to meet a legally mandated deadline unavoidably arose from circumstances beyond that litigant's control." *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560-561 (6th Cir. 2000). When determining whether equitable tolling is appropriate, courts must consider: "(1) the petitioner's lack of notice of the filing requirement; (2) the petitioner's lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the respondent; and (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim." *Dunlap*, at 1008, *supra*.

The petitioner never received any type of notification of the filing requirement and to this date, did not know this was a potential problem.

The petitioner did not have constructive knowledge of the filing requirement, unless depending on the attorney's knowledge would be constructive to me.

Petitioner has heard about the motion for relief from judgment as being a form of finality and very hard for prisoners to do for themselves. Petitioner has no knowledge of the requirements of the federal courts and the habeas petition. It has taken petitioner all this time to find someone in the prison who would be able to help her and understood what the respondent's motion to dismiss was all about.

Conclusion

WHEREFORE, Petitioner, Rosemarie McSwain, prays this Honorable Court DENY Respondent's Motion to Dismiss and find the petitioner timely filed her habeas petition and/or find this is a case which is appropriate to apply the doctrine of equitable tolling.

Respectfully Submitted,
s/ Rosemarie McSwain
Rosemarie McSwain

Petitioner, PRO SE
197760
Huron Valley Complex Women's
3511 Bemis Road
Ypsilanti, MI 48197

Dated: 2006, May 21st

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROSEMARIE McSWAIN,

Petitioner,

V.

SUSAN DAVIS,

Respondent.

_____/

CASE NO. 05-CV-73545-DT
HONORABLE GERALD E. ROSEN
UNITED STATES DISTRICT JUDGE
HONORABLE STEVEN D. PEPE
UNITED STATES MAGISTRATE JUDGE

ROSEMARIE McSWAIN,
#197760
Huron Valley
Complex/Women's
3511 Bemis Road
Ypsilanti, MI 48197

MICHAEL A. COX
Attorney General

Laura A. Cook (P44718)
Assistant Attorney General
Attorney for Respondent
Appellate Division
P.O. Box 30217
Lansing, MI 48913

MOTION FOR APPOINTMENT OF COUNSEL AND EVIDENTIARY HEARING

Petitioner, Rosemarie McSwain, *pro se*, moves this Honorable Court to grant this motion for appointment of counsel, pursuant to 18 USCA 3006A (a)(2)(B), on the grounds that the petitioner is unable

to present the case due to the complexity of the case, the petitioner is unable to afford a lawyer, the petitioner could not obtain justice without an attorney, the petitioner's mental competence is in question and will require an evidentiary hearing.

BRIEF IN SUPPORT OF MOTION FOR APPOINTMENT OF COUNSEL

Though a petitioner in a habeas proceeding has no constitutional right to counsel, *Cobas v Burgess*, 306 F.3d 441, 444 (6th Cir. 2002), 18 USCA 3006A (a)(2)(B) provides, "whenever the United States magistrate, United States magistrate judge or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who is seeking relief under section 2241, 2254, or 2255 or title 28."

Appointment of counsel in a habeas proceeding is mandatory only if the district court determines that an evidentiary hearing is required. *Swazo v Wyoming Dep't of Corrections*, 23 F.3d 332, 333 (10th Cir. 1994).

A petitioner is entitled to an evidentiary hearing on the issue of competency to stand trial if she presents sufficient facts to create real and substantial doubt as to her competency, even if those facts were not presented to the trial court. *Boag*, 1343, infra. Petitioner has appended the reports supporting her diagnosis which should provide real and substantial doubt as to her competency during her trial in 1988, there-before and there-after.

The test for competency to stand trial is whether the defendant had "sufficient present ability to consult with her lawyer with a reasonable degree of rational understanding and whether she had a

rational as well as factual understanding of the proceedings against her." *Boas v Raines*, 769 F.2d 1341, 1343 (9th Cir. 1985).

To obtain relief on a substantive incompetence claim, petitioner must present evidence "sufficient to positively, unequivocally, and clearly generate a real, substantial and legitimate doubt as to her mental capacity." *Watts v Singletary*, 87 F.3d 1282, 1290 (11th Cir. 1996).

Alternatively and because habeas corpus is an extraordinary remedy for unusual cases, the appointment of counsel is therefore required only if, given the difficulty of the case and petitioner's ability, the petitioner could not obtain justice without an attorney, she could not obtain a lawyer on her own, and she would have a reasonable chance of winning with the assistance of counsel. *Thirkield v Pitcher*, 199 F. Supp. 2d 637, 653 (E.D. Mich. 2002). Petitioner's case presents a very complex issue of mental competency and how it related to this petitioner as diagnosed, **MPD-Multiple Personality Disorder/DID–Dissociative Identity Disorder**. It has taken experts in the field, two decades to qualify MPD/DTD as a serious mental condition. The petitioner's competency was never evaluated prior to her trial.

Ultimately, counsel may be appointed, in exceptional cases, for a prisoner appearing pro se in a habeas action. *Johnson v Howard*, 20 F. Supp. 2d 1128, 1129 (W.D. Mich. 1998). The exceptional circumstances justifying the appointment of counsel to represent a prisoner acting pro se in a habeas action occur where a petitioner has made a colorable

claim, but lacks the means to adequately investigate, prepare or present the claim.

Petitioner has been abandoned by her appellate attorney, John L. Grace III, who was appointed by the Michigan Appellate Assigned Counsel System, for the Michigan Appellate Courts. In his good grace, he assisted in filing petitioner's habeas petition; however, he has made clear, he is not versed in Federal Habeas Practice. (see appended 2 letters)

Conclusion

WHEREFORE, Petitioner, Rosemarie McSwain, prays this honorable Court grant this motion for appointment of counsel and evidentiary hearing.

Respectfully Submitted,
s/ Rosemarie McSwain

Rosemarie McSwain

Petitioner, PRO SE
197760
Huron Valley Complex Women's
3511 Bemis Road
Ypsilanti, MI 48197

Dated: 2006, May 21st

AFFIDAVIT

STATE OF MICHIGAN)
) SS
COUNTY OF WASHTENAW)

I, Amira Salem, #258302, being duly sworn, deposes and says that the following is true to the best of my information, knowledge, and belief:

1. I, Amira Salem, trained in the law, assisted Rosemarie McSwain in researching and preparing her Petitioner's Response to Respondent's Motion to Dismiss for Failure to Comply with the Statute of Limitations and Brief in Support, and her Motion for Appointment of Counsel and Evidentiary Hearing.
2. On May 16, 2006. Rosemarie McSwain approached me seeking assistance in understanding the Respondent's Motion to Dismiss.
3. Rosemarie McSwain explained to me that her attorneys of the past never informed her there was any risk involved in filing this habeas corpus petition.
4. Rosemarie McSwain seemed very frazzled and frustrated, and unknowing what to do.
5. Upon reviewing her documents, I realized that time was of essence, and immediately assisted Petitioner in preparing the aforementioned documents submitted.

Further affiant sayeth not.

Date: May 22, 2006

/s/ Amira Salem .
Amira Salem, #258302
Huron Valley Complex/Women's
3511 Bemis Road
Ypsilanti, MI 48197

APOLLINARIS B. MWILA
Notary Public, State of Michigan
County of Wayne
My Commission Expires Aug. 23, 2012
Acting in this County of Washtenaw

Subscribed and sworn to before me
this 22 day of May 2006
/s/ Appollinaris B. Mwila

APPENDIX

A Affidavit and Vitae of Irwin Adelson, M.D.

B Report and Vitae of Steven Miller, Ph. D.

C Report and Vitae of Leslie Pielack, M.A.

D Affidavit of Tom Parker

E Attorney John L. Grace III's letters

JOHN L. GRACE III, P.C.

125 OTTAWA N. W., Suite 250
Grand Rapids, Ml 49503
Phone: 616.235.0700
Fax: 616.233.0661

December 8, 2005

Honorable Steven D. Pepe
United States Magistrate Judge
United States District Court
PO Box 7150
Ann Arbor, MI 48107

Re: Rosemarie McSwain v Susan Davis
Case No. OS-CV-73545

Dear Honorable Magistrate Judge Pepe:

Please be advised I was appointed to represent Ms. McSwain by the Michigan Appellate Assigned Counsel System in the Michigan Court of Appeals on the underlying criminal appeal in this matter. Thereafter, I filed an Application For Leave to Appeal in the Michigan Supreme Court on her behalf and was eventually compensated by Kent County Circuit Court for my services. As such my appointment has expired. Nonetheless, I assisted Ms. McSwain in filing an In Pro Per Petition For Habeas Corpus in the Eastern District Federal Court.

Thereafter, I was served an Attorney Appearance by the Michigan Attorney General. As I do not represent her in this matter I am asking this Court for direction as to how to proceed.

Sincerely,

John L. Grace III

cc: Brenda E. Turner
Assistant Attorney General

JOHN L. GRACE III, P.C.

125 OTTAWA N. W., Suite 250
Grand Rapids, MI 49503
Phone: 616.235.0700
Fax: 616.233.0661

April 12, 2006

Honorable Steven D. Pepe
United States Magistrate Judge
United States District Court
PO Box 7150
Ann Arbor, MI 48107

Re: Rosemarie McSwain v Susan Davis
Case No. 05-CV-73545

Dear Honorable Magistrate Judge Pepe:

Please find enclosed a copy of a letter I sent to you last December regarding Ms. McSwain's Petition For Habeas Corpus. I was served with a Motion To Dismiss. I do not represent Ms. McSwain in this matter as indicated in my earlier correspondence.

Moreover, while I have years of experience in State Court I have never been involved in Habeas practice. I assisted Ms. McSwain because it appeared her case had merit

Please advise.

Sincerely,

John L. Grace III

cc: Honorable Gerald E. Rosen
United States District Court Judge

Ms. Laura A. Cook
Assistant Attorney General

Ms. McSwain

APPENDIX

Index to Appendix

CURRICULUM VITAE

Date of Preparation: 10 June 1993

s/ Irwin P. Adelson MD
SIGNATURE

Soc. Sec. No: 381-34-6781

OFFICE: 250 Martin St.
Suite 208
Birmingham, MI
48009
(313) 540-7460

NAME: Irwin P.
Adelson, M.D.
HOME: 25401
Tweed Drive
Franklin, MI 48025
(313) 626-5388

PERSONAL DATA

Date of birth: 27 August 1936

Married, 3 sons

EDUCATION

B.A. with Distinction & Honors in Philosophy – University of Michigan, June 1958

M.D. – University of Michigan Medical School, June 1962

TRAINING

Rotating Internship - Mount Sinai Hospital of Cleveland, Ohio, July 1962 -June 1963

Psychiatric Residency - Detroit Psychiatric Institute, Detroit, Michigan, July 1968 - June 1971

Psychoanalytic Training - The Michigan Psychoanalytic Institute, Southfield, Michigan, 1971 -1978

Training in Clinical Hypnosis:

Workshops of The American Society of Clinical Hypnosis:

Basic: 13-15 March 1988

Intermediate: 11-15 March 1989

Advanced: 24-28 March 1990

Workshop of The International Society for the Study of Multiple Personality & Dissociation on Hypnotic Techniques in the Treatment of Multiple Personality & Dissociative States: 6 November 1987

Workshop on Ericksonian Hypnotherapy conducted by Stephen Gilligan, Ph.D.: 27-30 October 1989

Training in Working with Multiple Personality Disorder & Dissociative States:

Workshops & Scientific Programs of The International Society For The Study of Multiple Personality, Dissociation:

Basic: November 1987

Intermediate: October 1988

Advanced: November 1991

FACILITY APPOINTMENTS

Instructor of Course "Psychology of Everyday Life"—Institute of Labor & Industrial Relations, Wayne State University, Detroit, Michigan, 1969–1970

Instructor– Department of Psychiatry, Wayne State University School of Medicine, July 1971–June 1977

Clinical Assistant Professor–Department of Psychiatry, Wayne State University School of Medicine, July 1977

Clinical Assistant Professor—Department of Psychiatry, Michigan State University, October 1975–May 1980

TEACHING

Psychotherapy supervision of psychiatric residents at the Detroit Psychiatric Institute and Private Practioners—June 1976–June 1995

Demonstration seminar in Techniques of Psychotherapeutic Interviewing, Detroit Psychiatric Institute—weekly—July 1977–June 1994

In-patient. continuous case Conference, Detroit Psychiatric Institute—weekly–October 1982–June 1995

Consultant to Individual Case Review Conferences on Problem Clinical Situations, Detroit Psychiatric Institute weekly—February 1992–June 1988

PROFESSIONAL APPOINTMENTS & EXPERIENCE

Anesthesiologist—Captain, Medical Corp, U.S. Army, July 1963–July 1965

Valley Forge General Hospital, Phoenixville, Pennsylvania

44th MASH & 121st Evacuation Hospital, Korea

Womack Army Hospital, Fort Brag, North Carolina

General Medical Practice:

1) Student Health Service, Wayne State University, Detroit, Michigan, September 1965 –December 1966

2) Full-time Staff, Department of Medicine, Metropolitan Hospital, Detroit, Michigan, January 1967–Jun. 1968

Psychotherapist Adult Psychiatric Clinic, Detroit, Michigan, July 1970–June 1971

Psychiatric Consultant—Operation Friendship, Detroit, Michigan, February 1970–December 1971

Psychiatric Consultant—Narcotic Addiction Program for Pregnant Women, Hutzel Hospital, Detroit, Michigan, July 1972–August 1973

Psychiatric Consultant—Special Entry & Therapeutic Ward, Clinton Valley Center, Pontiac Michigan, November 1979–October 1980

Psychiatric Consultant—Veterans Administration Medical Center, Allen Park, Michigan, October 1979 -September 1986

Psychiatric Consultant (including case consultations: quality assurance, utilization review)—The Maple Clinic, Birmingham, Michigan, September 1983–May 1986

Peer Reviewer—The American Psychiatric Association, 1984 – 1985

Staff Psychiatrist—Providence Hospital Mental Health Clinic, Southfield, Michigan, July 1975–January 1976

Staff Psychiatrist—Detroit Psychiatric Institute, Detroit, Michigan, July 1971–March 1973

Supervising Psychiatrist (including quality assurance reviewing as well as the teaching described on page 2)—Detroit Psychiatric Institute, May 1976–September 1997

Private Practice of Psychiatry—July 1971–

Consultant to and Co-Coordinator (with C. Deflon, M.D. & R. Taylor, M.D.) of the Chronic Pain Treatment Program at William Beaumont Hospital, Royal Oak, Michigan—January 1980–December 1983

Active Attending Staff—Department of Psychiatry, William Beaumont Hospital, Royal Oak, Michigan, 1976–

Coordinator for Continuing Medical Education Programs—Department of Psychiatry. William Beaumont Hospital, Royal Oak, Michigan, 1976–1991

Courtesy Staff—Providence Hospital, Southfield, Michigan, 1976–

Clinical Coordinator—Southeast Michigan Study Group, a component society of the International Society for the Study of Multiple Personality & Dissociation, 1993–

PROFESSIONAL SOCIETIES

American Medical Association

American Society of Clinical Hypnosis

American Society of Psychoanalytic Physicians

International Society of Hypnosis

International Society for the study of Multiple Personality, Dissociation and its component society the Southeast Michigan Study Group

Michigan Psychiatric Society

Michigan Psychoanalytic Society

Michigan State Medical Society

Oakland County Medical Society

Society For Traumatic Stress Studies

Swedish Society of Clinical . Experimental Hypnosis

Wayne County Medical Society

LICENSURE

State of Michigan—issued 20 June 1963

State of New York—issued 4 June 1968

State of California—issued 14 June 1968

BOARD CERTIFICATION

American Board of Psychiatry & Neurology—in Psychiatry, April 1974

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF KENT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v. LC No.
ROSEMARIE McSWAIN,
Defendant-Appellant.

County Prosecutor
Courthouse
Grand Rapids, MI 49503
Tx: (517) 224-5260; Fax: (517) 224-5254

Jeanice Dagher-Margosian (P35933)
Attorney for Defendant-Appellant
3300 Washtenaw, Ste. 290
P.O. Box: 2016
Ann Arbor, MI 48106
Tx: (313) 761-5516; Fax: (313) 761-6482

AFFIDAVIT OF IRWIN ADELSON, M.D.

NOW COMES the undersigned affiant, being sworn, and states as follows:

1. I am a practicing psychiatrist with extensive treatment and diagnostic experience in the area of Multiple Personality or Dissociative Identity Disorder (DID). See curriculum vitae, attached.

2. I have viewed the taped interview which Rosemarie McSwain participated in with Leslie Pielack. After viewing the tapes, it is my professional opinion that Ms. McSwain suffers from DID

3. DID normally has its genesis in early childhood. It is my professional opinion that Ms. McSwain's disorder began to develop in childhood as well.

s/ Irwin P. Adelson DATE: 6-25-98
Dr. Irwin Adelson

Subscribed and sworn to
before [illegible] notary public
this [illegible] 25th day of June 1998
/s/ Jeanice Dagher-Margosian

My commission expires:

JEANICE DAGHER-MARGOSIAN
Notary-Public, Washtanaw County, MI
My commission Expires Nov. 4, 2007

6/25/98

Dr. Steven R. Miller, Ph.D., L.P.
Forensic-Clinical Psychology
Licensed Psychologist-Certified Forensic Examiner
400 Monroe Street, Suite 460
Detroit, Michigan 48226
Voice: (313) 963-8597 Fax: (313) 963-3332

February 5, 1998

Jeanice Dagher-Margosian
325 E. Eisenhower Suite 100
P.O. Box 2016
Ann Arbor, MI 48100

RE: Rosemarie McSwain

PSYCHOLOGICAL ASSESSMENT

Dear Ms. Dagher-Margosian:

BACKGROUND INFORMATION

At your request, I interviewed Rosemarie McSwain at the Scott Correctional Center for the purpose of performing a psychological assessment and making a diagnosis. At the present time, Ms. McSwain is incarcerated serving a sentence for Murder, First Degree and Felony Firearm. I met with Ms. McSwain for three separate interviews of approximately three hours each. The first interview was on March 4, 1997, the second on March 11, 1997, and the last on March 18, 1997. During the course of these interviews, gathered a comprehensive social and psychological adjustment history, spoke to her in detail regarding her psychological adjustment while incarcerated and throughout her life, and also obtained from her a detailed accounting of the

circumstances surrounding the offense which led to her incarceration.

During the course of these several interviews, this examiner took notes and additionally reviewed the following documents: the entire Psychiatric Record of Admission, Treatment and Discharge by Huron Valley Center, Case No. 197760, date of admission, January 22, 1997, and sundry handwritten notes and drawings provided by the inmate.

IDENTIFYING DATA

The patient is a 29 year old African-American, female, who is incarcerated at Scott Women's Facility. The background of mental health treatment of the inmate includes hospitalization at Pine Rest Hospital in Grand Rapids when she was a child at approximately 11 or 12 years of age and hospitalization at the aforementioned Huron Valley Center in 1997. The patient reports being incarcerated since 1988.

GENERAL MENTAL STATUS ASSESSMENT OVER COURSE OF INTERVIEWS

The most remarkable thing about the patient's presentation throughout all of the interviews is that she presents with Disassociative Identify Disorder (DID) (formerly known as Multiple Personality Disorder or MPD). Over the interviews with the inmate, I observed and interviewed different "personalities" and was made aware of other "personalities" in her "system of personalities" which did not assume "executive control" of the body, but made their presence known and their function(s) known through other personalities who did report to me directly. The patient identified the following personalities: Bambi, Lucy, Rosemarie, Baby Rose,

Passion, Marie, Maria, Gemini Light and Gemini Dark. At different times during the course of the several interviews, I had contact with all but Gemini Dark, "Because he does not speak directly with others in your world". The patient's "core" or "host" personality is Rose, or, as she is sometimes known as "Rosemarie".

From what I was able to piece together in my brief encounter with the inmate, she appears to have "fragmented" (i.e., split) when she was very young, at approximately age three, and at this point, her first alter appeared who she now refers to as "Baby Rose". (Note: The distinction between Rose and Baby Rose is not always made clear and therefore can be confusing if this distinction is not made explicit. The staff at Huron Valley Hospital appear to have become confused by this). Other personalities "came along", if you will, at different times in order to deal with different situations (i.e., psychological/emotional catastrophes) in the patient's life in terms of type, intensity, frequency and quality of the abuse she was suffering through at the time. For example, the "alterpersonality", she calls "Maria", appeared in order to deal with a Latin boyfriend. Maria has an accent of sorts and is said to be the personality of choice to deal with "...foreigners of all types, she is usually better able to understand their language then any of the others." The personality Lucy appeared in order to deal with abuse during her early adolescence by her then stepfather "Lucy was older (by 10 years) and more mature and could better deal with the adults abusing us". Inasmuch as she developed sexual identity problems and therefore a degree of sexual dysfunction in terms of being able to enjoy sex, a personality referred to as "Passion" "came out" in

order to deal with this aspect of her situation at the time (e.g., . she was "in love" and wanted to have a "normal sexual relationship with a man". She, later, became involved in exotic dancing and prostitution, which resulted in a "new" personality, "Bambi", appearing on the scene (We will say more about Bambi presently) The personalities she refers to a "Gemini Light'" and "Gemini Dark" are "helper" type personalities which provide her with "wisdom and guidance".

While incarcerated, she reports the personality "Bambi" has been the one assuming control of the body "most of the time". As the inmate explains, "When we got into this mess and came to jail, everyone (internally) was at war and we couldn't agree on anything. Since Bambi was made up of parts of some of the others, she was elected to deal with the world."

At the time that I evaluated the inmate, her various disassociated personalities were aware of each other and, thus, possessed what is known as "co-consciousness" with each other. However, while all the personalities are aware of each other, they are not, necessarily, aware of the actions or behaviors of the other personalities when they are "out" (i.e., a personality is considered "out" who is in executive control of the body) and assume executive control of the body and "deal with the world". Therefore, memory functioning when spread across personalities is highly variable; however, memory for events may be thought of as essentially "intact" inasmuch as one or more of the personalities has "memory" for events participated in. Indeed, it is sometimes necessary to make contact with a specific personality who "was

out at the time" and dealing with someone or some situation, in order to obtain a reasonable "recollection" of that situation. However, there are occasions when one personality can report on the activities, etc. of other personalities with reasonably good accuracy.

The personalities, which have been mentioned, may not encompass the entire personality system of this patient. [i] Indeed, it is more likely that their remain other "splits" that the patient remains unaware of until well into the psychotherapy process. However, these personalities of Ms. McSwain do currently represent the most highly developed personalities within her "system". Unfortunately, at this particular time, the personalities have marked differences of opinion and are not able to negotiate resolutions to many, or even most, of the day-to-day problems which the patient must confront. However, inasmuch as all the personalities have developed in an "adaptive manner" in order to assist the inmate to negotiate her life, she is able to switch among them and draw from the various strengths of the several personality types. Inevitably, however, problems and tensions arise as a result of differences of opinion, value and "agenda" between disassociated personalities within the system, this can lead to some

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[i] The organization of a "personality system" such as this one is typical of those with DID. That is, research and reports of those specializing in the treatment o this type of disorder report that "typically" there are "personalities" of box sexes, adult and child personalities of varying ages and usually "helper" or "guiding" personalities that give advice and attempt to act as mediators with the other personalities of the system. There usually are also personalities that "" old the anger and rage" and still others that deal with sexual matters.

very interesting and troubling results and, from the point of view of others, the manifestation of "bizarre" behavior (Note: An internal conflict such as this appears to have been essentially what lead to the hospitalization at Huron Valley, noted above). Furthermore, at times, this has also led to the creation of yet a new personality as an attempt to form a "compromise" between the "warring factions" within her system. Apparently, the personality Bambi was such a compromise formation.

SUMMARY OF INTERVIEW CONTACTS

The first personality that I engaged on the occasion of my first interview on March 4, 1997, was Bambi. She indicates that she, i.e., "Bambi" was the one that was prosecuted for these charges and is the one who has principally been in control of the body since coming to jail in 1988. She states that at the time of her arrest, she (Bambi) "...consulted with Gemini Dark and we turned ourselves in. Some things happen in life and he tells us that we should turn ourselves in."

She states that at the time of her arrest on the instant offense, she was working as a prostitute in the Grand Rapids area and that she was living with her pimp, whose name was "Roni". She states that she met Roni in 1984. Interestingly, at the same time, another personality by the name of "Maria" was having an affair with a Cuban gentleman who she referred to as "Antonio". She apparently met this Cuban boyfriend through her work as a waitress. The personality dealing with the boyfriend, waitressing, and later, apparently with the pregnancy created by the union with this individual, was the alter-personality, Maria. Also, at the same

time, she reportedly was carrying on another relationship with an individual by the name of "Paul Martin". The personalities that "dealt with Paul" were those of her teenage alter-personality, Rosemarie, and the "sexual" alter-personality "Passion". She reports that Antonio is the father of her daughter, Porsche (mother, therefore, is Maria) and Paul Martin is the father of her daughter, Tiffany (mother, thus is Rosemarie). In the midst of all of this, she was apparently also working as an exotic dancer, and due to the fact that Maria and Rosemarie "wouldn't have anything to do with that dancing stuff", the alter-personality, Bambi "was born".

With regard to Bambi's appearance, Ms. McSwain reported the following: "When the body was about 11 or 12 years old, she was taken away from Susan (her biological mother) and placed with a whore named Diane Lopez and her pimp, Robert Harris. Robert Harris started to abuse her. The child had to watch porno movies and was taught to deal with all type of sexual encounters. This was when Passion was born. It took a long time for Passion to be born. It took a long time for her to be a whole person, and this didn't happen until the birth of Rose's first child. Passion was able to make it where sex was OK. It wasn't bad. She is the one who still deals with intimacy. Rosemarie is not OK with sex. We are still teaching her. Passion has taught us. Bambi is a split of Passion and I'm a cross between Passion and Lucy. Sometimes we call Lucy, "Lucifer". We all joke that she is the Devil's daughter (i.e., Bambi) came out in a strip bar, Parkway Tropics in Grand Rapids. She (i.e., Rosemarie) was 16 or 17 at the time. They were

all stripping. The stage was part of what triggered me to come out. Passion got so mixed up into the exotic aspects of the dancing, she didn't attend to the money, and Lucy became furious about it. Lucy felt that Passion was too stupid and didn't pay attention to the money. They fought all the time, and (Bambi) came to break it up and settle their fight. Bambi is a combination of Lucy, Rosemarie and Passion. Bambi is more of a "happy medium".

According to Bambi, they first got involved with the exotic dancing and then within approximately one year of their start with dancing, they began prostitution. At about this time in her life, she began to develop a very serious substance abuse problem, also. Lucy seems to be the one with the strongest substance abuse issues.

During that first interview with Bambi, she reported other information about some of the alters, including Lucy. Since this was our first interview, she did not appear comfortable enough to switch between alters so that I could speak directly with them; however, as rapport was eventually developed in later interviews, I did have an opportunity to speak directly with Lucy, Rosemarie, Baby Rose and Gemini Light.

The personality Lucy is important with respect to this evaluation, because as we will review presently, she was deeply involved in the circumstances leading up to and following the criminal charges, which brought Ms. McSwain to jail. It was through Lucy that I first learned about the details surrounding the incident. Inasmuch as Bambi was "born from parts of others"; she had a wide knowledge of the backgrounds of others and was well aware of all of

the pertinent events that have taken place since the arrest and incarceration.

At the second interview I met with "Baby Rose" who was a "seven year old" female. Rose reported that she remembers living with her mother and a friend of her mother's who had two sons, one named Christopher. She indicates that Christopher was a teenager who was maybe 16 or 17 at the time and who began abusing her sexually by fondling her and so forth. She also reported being abandoned by her mother and left alone for long periods of time. Her mother was a prostitute and who would take off for "sometimes days or weeks at a time". The sexual abuse by Christopher was apparently taking place in his room, and she estimates that she was approximately three or three and a half at the time. As I asked her more questions regarding details of these events, she became more agitated and more tearful. Then, at this point of the interview, which was approximately 40 minutes into the beginning of the interview, Ms. McSwain switched to Bambi.

At this point in the interview, I began to ask questions regarding who the "host personality" is for Ms. McSwain's system. She related that that would be Rosemarie, who she described as "too emotional". She indicated that Rosemarie was "suicidal and that she "puts herself in dangerous situations and will sometimes hurt herself. She has burned herself and scraped herself on objects to punish herself."

Having reviewed the Huron Valley records, I asked the inmate some questions about this admission, since it had been just a little over two months prior to these contacts. She stated that "Baby Rose" came out and was apparently withdrawing and caused others

to be concerned about her behavior, so she was sent to Huron Valley where she talked to a psychiatrist, psychologist and a social worker. She was obviously irritated by some of these contacts with these various clinicians, and stated that the psychologist had "slammed his hand on the table, telling Rose (Baby Rose) to switch and it scared her." During the second visit, I also had an opportunity to speak with Rosemarie, quite likely the host personality, and, additionally, directly with Lucy. I was informed that Lucy was born "down south in Mississippi in order to deal with..." her mother's second husband. She was approximately ten years old at the time that Lucy was born. Lucy, from the beginning, was "older" than the body. "Then she was an adult. Now she is in her 40's." The stepfather that was abusing her was referred to as "Sonny", and Lucy related the following: "Sonny started to sexually abuse Rosemarie and Rose (Baby Rose) and then "It" came out (e.g., "It" refers to the "rage" that the system felt in response to Sonny's abuse of them all.) Then Lucy came out. Sonny worked them all. Made them household slaves. Had to rake the yard, cook, and then there was sex. All types of sex, oral, anal, and intercourse. We feel that mother knew about all this abuse.

Bambi later found out that mother knew. Rosemarie and her mother had been with Sonny from an early age and then left and then came back with him when the body was six or seven. The body got sent to Massachusetts. Rosemarie's mother got raped at some point. After she got raped, the body got raped and the body got sent to Massachusetts with Helen Ford. The body went to Massachusetts at age

six or seven. Sometimes Helen was a bit harsh, but they loved her. She did not abuse them. There were whippings, but there was no sexual abuse." She indicated at that time that Rosemarie was acting out sexually with boys in the neighborhood, something not uncommon for sexually abused children.

After meeting with Lucy for the first time, I asked to meet with Rosemarie. I had a brief conversation with Rosemarie prior to terminating the interview on the second occasion. Rosemarie indicated that she is a teenager who is 15 years of age. She points out that she is "one of the originals". Rosemarie is a teenager and tends to be "rebellious" and has a history of self-mutilation and multiple suicide attempts. Rosemarie has recollections of being abused by her mother's second husband, Sonny, and also by another common law partner of her mother's by the name of Robert Harris, when she was 12 or 13 years of age. Indeed, Rose's strongest recollections and most extensive sexual abuse were by Robert Harris. Apparently, the alter personality Lucy tended to deal with Sonny and his sexual abuse so, therefore, Rosemarie has fewer direct recollections of being abused by Sonny.

SUMMARY OF DEVELOPMENTAL HISTORY

Due to the fact that I learned about the developmental history through the presentation of various personalities who presented at various times, I did not have the luxury of having the opportunity to record the developmental history information in a chronological fashion. Therefore, a summary of what I learned from the first interviews would probably be helpful to the reader.

Apparently, Ms. McSwain was born Rosemarie McSwain in Grand Rapids, Michigan. Her mother was a prostitute, probably drug addicted, and certainly alcoholic. Rose was moved around constantly from place to place during her early childhood. There were numerous men in her life, many, apparently, posing as the "father". Rose has recollections of being abandoned by her mother many times for long periods of time during these early years. She also has recollections of being sexually abused beginning at the age of approximately three, and continuing throughout her life at various times by different men who were involved with her mother at the times they tortured and abused her. She was sexually abused by an individual by the name of Sonny, who was her mother's pimp, when she was approximately six: or seven years of age, and then again later, when they rekindled their relationship when he was released from prison, when she was approximately ten years of age. There was also another individual by the name of Harris, who sexually abused Ms. McSwain when she was in her early teen years, between the ages of 12 and 15, approximately.

At the age of 16, Ms. McSwain was pretty much on her own. She then began to follow in her mother's footsteps and engage in her own involvement with narcissistic and abusive male companions. The exotic dancing started at approximately the age of 17 and the prostitution also at about that time. During her middle teens, she was involved in relationships with three different men. These relationships were somewhat overlapping and, at times, apparently simultaneous. However, some of the relationships were carried out by different personalities and,

therefore, not necessarily known to the other. She has two children from two different men from pregnancies in two of these relationships. As mentioned above, an alter personality by the name of Maria, who has a "Spanish personality", was involved with a male by the name of Antonio and produced a female child by the name of "Porsche". Rosemarie was involved with a man by the name of Paul Martin, who she reports is the father of her now 15-year-old daughter, "Tiffany". The third man to come into her life was Roni, who became her pimp, and helped organize her prostitution activities so that both of them could support their respective drug habits. They were equally addicted to alcohol and cocaine at the time. The primary personalities involved with Roni were those of Rosemarie, Lucy and Bambi. However, when she was involved in her prostitution activities, "sometimes" the personality Maria would come out in order to deal with "some of the tricks that were Latin or other foreigners. Maria had a way of talking to them, so she would do the talking".

In my conversations with Bambi, Rosemarie, and Lucy, their comments about their relationship with Roni were fairly consistent in describing him as an extremely abusive and violent individual who became more and more controlling, violent, and abusive as his drug addiction increased and, therefore, as his need for money to purchase drugs increased. She spoke of times where there were lengthy beatings wherein she ,was beaten with objects and placed into a closet and left there for days at a time. On many occasions, he put a gun to her head or threatened her with a knife or with bodily harm, or, more typically, with all three. She described beatings by Roni as commonplace and "everyday". She states she did not

know how to remove herself from this abusive relationship, as she truly believed that he would "...hunt me down and kill me" if she ever decided to leave him. She reports that the way that she dealt with all of this abuse and torture was to "get high". When she was able to raise enough money to buy drugs from her prostitution, she could "at least keep him high and quiet". However, whenever she had a "slow day", she risked being beaten and terrorized at length. She noted that parts of her, particularly Lucy, "...hated him, and always wanted to fight back. The rest of us were just too scared. Sometimes when Lucy would come out and mouth off to him, we all would get beaten even worse. Most of the time, Lucy would go back in and let Bambi or Rosemarie take the beating. It was constant arguing and carrying on (e.g., internally between alters) ."

REVIEW OF OFFENSE

At the end of the second interview, I spoke at length to Lucy, and asked her to relate to me the details of the events surrounding the offense. The following is reported from my notes of that meeting and comments made by Lucy:

> The charges, apparently, stem from an incident that took place, according to Lucy, when they were prostituting in the Grand Rapids area: Lucy stated: "We were all whoring, prostituting, or whatever". She explained that they (i.e., the system of alters) "worked together", meaning her system worked together, and that depending on the "type of trick" which they wished to solicit, one or more of the personalities would be brought out to "deal with it."

By her accounting, they were on Division Street in Grand Rapids when the decedent pulled up and wanted "a date" and, according to Lucy, she went over to the car and "couldn't understand him, so, I let Maria (Maria, the "Latin" personality) deal with that. She, Rosemarie, got into the car with him and he was bullshitting her but didn't know it. She directed him to her girlfriend's house, a place where she would go to turn her tricks. It was a house where she could transact business, usually in exchange for drugs. "He (*i.e.*, the trick) didn't want to pay for a hotel or whatever, so she took him there." Lucy goes on to explain that while Rose is "dealing with this guy", she is focusing on her need to feed her drug addiction habit, and that she had earlier obtained some drugs, part of which she was going to give to her pimp, "Roni", after she used some herself and gave some to her female friend for use of the house.

When she got to the house she talked to her friend Levita (a.k.a. "Vickie") and gave her some of the drugs to "hold" while she completed the money transaction with the trick. She figured that Levita (a.k.a. "Vickie") would go and use some of the dope and that in a few minutes, after she finished collecting the money from the trick, she would join Levita (a.k.a. "Vickie") in the bathroom and use some herself (As Lucy). Thus, during this time she was switching back and forth between Rosemarie, who was dealing with the trick, and Lucy, who was trying to get high and was dealing with Levita (a.k.a. "Vickie").

When she finally got to the bathroom and asked "Levita" (aka Vickie) where the dope was, so that

she "could get high", Levita claimed that she had "accidentally flushed it down the toilet". Quite naturally, Lucy didn't believe this story, and she got very angry with Vickie, at which point she pulled out a handgun from her handbag and "...started waving it around, demanding that Levita tell her where the dope is."

Just prior to this, the trick apparently became anxious because he heard the car door on his car parked in the driveway, slam. Lucy described this as follows: "He hears the door slam on his car and he puts his pants back on and starts to head on out to see what's going on with his car." At this point Lucy pulls the gun out and starts waving it around at Vickie and both the trick and Vickie start getting very excited. To add to the mix, there's a baby in a crib, apparently, Vicki's baby whom starts crying at the top of her lungs.

Lucy then notes that there is an "internal battle" going on as well. She and Rosemarie are struggling over control of the body. She relates this struggle as follows: "Me and Rosemarie are struggling over the gun. I'm mad and I want Vickie to tell me where the dope is. This guy starts saying he's going to leave and he's not going to pay. He's got to pay, because I don' t want to get into trouble with Roni. Roni's going to beat my ass. And on top of it, now I don't have any drugs for him because Vickie used them all up. And the baby's crying and Rose's trying to come out and comfort the baby and there's all kinds of chaotic shit happening."

According to Lucy, at this point, Rosemarie wins the struggle and takes over and gives the gun to

Vickie. Vickie takes the gun, and after they calm down, puts it back in her purse. The guy says how he's leaving, and goes on out to the car and gets in it. Rosemarie starts to panic because the guy has not paid her, and she doesn't want to have Roni "beat all our asses". Therefore, Rosemarie heads out to the car, and when she gets there she sees the trick looking around in the car, apparently, for what he left there and may be missing. She asks him at this point: "Are you gonna give me a ride?" Lucy relates this exchange as follows: "Rosemarie asks him for a ride. He probably had his mind made up right then that he was going to beat her. But she can' t tell. But she gets in the car with the guy. She really doesn't understand what he is all upset about. She just wants a ride. They drive off. He's driving all kinds of crazy and shit, and starts yelling at her about where is his stuff and how he knows she and the other "bitch" (*i.e.*, Vickie) are in on it together and then he grabs Rosemarie by the back of the head and slams her head into the dashboard a couple of times. He also smacks her in the face. Rosemarie is telling him to please go with her and at least tell Roni why he isn't going to pay, because Roni's going to beat their ass because he ain't going to believe that shit. (Then, at this point in the resuscitation to this examiner, Lucy says: "Fuck that shit, who gives a fuck about Roni". Lucy, apparently, has different feelings about her ability to handle Roni then does Rosemarie). Lucy continues: "The car is stopped. He goes to put his hand on the gear shift and I (Lucy) come out and I shoot him in the arm to get him to stop from leaving (i.e., driving away). So we can get out of the car. As soon as he is hit, he grabs his arm with

his other hand and looks at me. Then he pulls his hand back and raises it and starts to come at me again and I shoot him in the head and he goes back and his head goes back. Then I got us the fuck out of there."

We was all having flashbacks. Even Rose (Little Rose) came out at one point, and begged him (the decedent) to let us out of the car." The flashbacks she is alluding to are those of previous episodes of abuse, especially by Roni. She related this as follows: "We were remembering Sonny and Roni and all those abusers and here was another abuser about to abuse us."

After relating this lengthy narrative to this examiner, Lucy goes on to express that she feels remorseful and responsible for the problems that they all have had to suffer as a result of her actions. She also feels that she is unfairly criticized for what she did, feeling that she "had to" do what she did for "self-defense" reasons. In particular, Lucy commented that she fights with Bambi "all the time".

Lucy then related that when they returned to the apartment "Roni wasn't buying any of that shit and then Bambi tried to talk to him. He ended up beating Bambi up, because Rosemarie didn't want to deal with it, and neither did I."

Lucy also frequently made reference to "craziness, chaos and confusion". In my opinion, she was not only referring to the chaos of the immediate situation with the" trick and Vickie, but, moreover to the switching in, and out of different personalities at different times during the entire incident. We now know that it was Lucy, apparently, who did the shooting in an effort to "... get us out of the car" and,

also, out of fear that "this trick was going to kill us all."

At my last interview, I met with Rosemarie in order to obtain her version of the offense. As noted above, much of the "switching" between personalities during the course of the offense was between Lucy and Rosemarie. During the interview, Rosemarie related essentially the same chronological story from beginning to end, in terms of the sequence of events which took place that have already been reported in the above by Lucy to this examiner. The difference, essentially, were in the "emotional factors" which were being experienced by Rosemarie during the course of the offense. Rosemarie's personality is more passive and she is likely to become much more anxious in such situations than would have Lucy, who is "tougher" and more able to deal with aggressiveness on the part of others. Rosemarie, on the other hand, has a tendency to be more "hyper" and to panic. In particular, Rose's emotional reactions were focused on her fears about what would happen to her when she returned to Roni without money. These anxieties were repeatedly expressed to the decedent, who apparently could not appreciate, or perhaps did not care, about the predicament that Rosemarie found herself in. It was also as a result of Rosemarie's emotional reactions that the situation may have more rapidly got out of hand because, as she notes, there was a baby crying in the background and that this "was driving me crazy". I think the crying baby constituted a significant "trigger" in terms of releasing Rosemarie's anxieties surrounding anticipated abuse.

Other aspects of the crime situation which are noteworthy are that, apparently, at various times, almost all the personalities "came out" in an effort to deal with the decedent in the course of this incident. The reason for his unusual occurrence is probably twofold; on the one hand, each personality tried to bring the situation under control and apparently it was thought that perhaps where one failed, another personality might succeed. The other reason is that some of the personalities simply "retreated" in fear or panic from the situation and hastily "pushed out" other alter-personalities to deal with the complainant. As noted in Lucy's recitation, "at one point, even Baby Rose came out. She was scared to death that she found herself there."

The act of splitting off into different personalities served a primarily defensive and adaptive function for Ms. McSwain, under the circumstances. On the other hand, the likely confusion as to "what actually happened or what was happening" added immeasurably to a rapid deterioration of her capacity to make reasonable or rational decisions about what to do under the circumstances. For example, Rose's willingness to accept a ride from the complainant after he was already in the car and backing out of the driveway, certainly showed an absence of common sense judgment on her part. However, we now know that she was absent some vital information about the source of this individual's anger and his desire to leave in such haste. In speaking to Rose about this obvious lapse in her common sense, she seems to have believed that she might still have been able to salvage the situation at this point, apparently, not recognizing that by this point in time, the complainant was no doubt enraged over the fact that

he had been robbed and that things had been taken out of his car. According to Rose, her focus, unfortunately, was on how to deal with her impending meeting with Roni and the beating that she anticipated receiving when she showed up without either money or drugs. Desperately trying to recover something from the situation, coupled with the fact that she only had partial information as to the "events" that had just transpired in the minutes before finding herself in this position, caused her to grossly misjudge the complainant's rage and, thus, she placed herself unwittingly in this very dangerous situation.

One final difference between Rose and Lucy's report is the actual experience of the firing of the gun. It is clear from the recitation of both Lucy and Rosemarie that Rosemarie's principal concern was trying to salvage the situation so that she did not receive a beating from Roni, and Lucy's concern, on the other hand, was less with that and more with protecting herself and the system. It is also clear that Lucy considered the shooting to be "self defense". Further, Lucy also notes that at the moment of firing the shot, she was overwhelmed by feelings of anger and rage: "We had been abused all these years by men. Rose was all upset about Roni struck him. I just decided that we weren't going to be abused anymore. And here was this man abusing us. We had to put a stop to it. Rose was just trying to get out of the car. First she was trying to talk him into going with her to tell Roni what happened so maybe she wouldn't' t get beat. But then she knew that she was in danger, after he smashed her head in the windshield. I decided that someone had to put a stop

to it. It's roy fault. I'm the one who brought us here (i.e., to jail)."

DISCUSSION

The above summary of my interview notes with the inmate was essentially intended as a substitute for the traditional "Mental Status Examination". Inasmuch as the Mental status Examination varies so greatly from session to session and even within contacts, a traditional Mental status is of no practical use with this type of patient. The highly unusual character of this particular presentation is due to the presence in this patient of Disassociative Identity Disorder (DID), formerly known as Multiple Personality Disorder (MPD).[ii] That is, the

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[ii] MPD was changed to DID with the introduction of the Diagnostic and Statistical Manual of Mental Disorders IV. The diagnostic criteria in the DSM IV are only slightly altered, however. The reason for the new name for the diagnostic phenomena, essentially, stems from the fact that clinicians working with this disorder became concerned that the universal fascination with "Multiple Personalities" tended to overshadow the real suffering of those diagnosed with this disorder in that it did not clearly underscore the problematic nature of the disorder as being "pathological" as the result of an absence of a true continuity of self identity and experience. The Introduction of the term DID also emphasized the key "symptom" of this disorder, which is "disassociation", From the point of-view of the public, much a ention is naturally given to the unique phenomena of varying and shifting personalities typically of different ages, sexes, and even tastes and values. The patient's very real problem, however, is not with the "individual" personalities per se, but with the shifting nature of contact with reality and memory for various events. Until the patient enters into treatment, the individual ordinarily has little direct control over the switching process and the degree of control varies markedly with the degree of anxiety and the context of the situation confronting the individual. Patient's with DID

fragmented and shifting cognitive and affective states along with marked and abrupt changes in memory are dynamically explained and understood by an acknowledgement of the phenomena clinically presented as Disassociative Identity Disorder.[iii]

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constantly carry on internal battles between alters for "control" over the body and for "time out" (i.e., time out in the world). While at first blush, this change from MPD to DID may seem pedantic and unnecessary, this new emphasis on disassociative phenomena over an above "multiple selves" invites the clinician and public alike to view the clinical presentation from an important and "different" perspective which more completely exposes the "problematic" aspects of the disorder.

[iii] DID is a rare disorder typically beginning in early childhood (before the age of five) and invariably tied to severe and repeated sexual physical and emotional abuse during the developmental phase. DID is essentially "adaptive" and serves the function of dealing with such horrendous trauma by "splitting off the traumatic experience and with it the memories of the experience into another isolated part of the self. At bottom, DID is nothing more, if you will, than a fantasy from the child's point of view that the traumatic experience is happening to "someone else". In addition, tremendous secondary gain is also derived from the blocking of the memory of the trauma by isolating the memory to the "alter" personality. This disassociative phenomena is akin to a form of self-hypnosis in the experience of both projecting it into "another personality" and in terms of it leaving the individual with an almost total absence of memory of the event(s). This experience is entirely "real" to the DID forming child. It appears that certain individuals, similar to what we know about the variability of "hypnotizability" of different people, are more susceptible to such extreme disassociative phenomena and, also, it appears that once the child "learns" how to employ disassociation in this fashion, subsequent spin-off personalities, which usually come about to deal with yet new traumas/memories, become rather automatic in their formation. As long as the child persists in the abusive situation, the "defense" of disassociation continues to aid the child adaptively in dealing with this often-horrifying

CONCLUSIONS

Based on the integration of all .the information available, it is my opinion that there is clear and convincing data that Rosemarie McSwain suffers from Disassociative Identity Disorder. Ms. McSwain demonstrates all of the objective severe and prolonged physical and sexual abuse and torture beginning in early childhood and continuing throughout the developmental phases of childhood and adolescence) that one would expect to find in someone developing this type of rare psychological personality organization. Ms. .McSwain additionally presents with a history of a severe substance abuse disorder (poly-substance abuse.

With regard to the legal issues she is currently exploring in terms of an appeal her case, I offer the following opinions, suggestions and recommendations:

1. With respect to the issue of her competency to stand trial at the time she actually stood trial for these offenses, I have substantial doubt that she was competent at the time. Given that she was suffering from DID at the time of her arrest, I do not believe

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environment. In addition, keep in mind that the demands on children to attend to reality are much less crucial to smooth functioning on a day-to day basis than such attention is to functioning, more or less, "normally" as an adult. In adulthood, the switching phenomena, often without any control and typically triggered by unexpected emotional events in the surround, leaves the adult feeling "crazy". Memory "gaps" are often "blamed on" substance abuse or are rationized to the self in order to defend against acknowledging that "one's mind is not one's own".

that she was competent to understand the object of the proceedings against her or was able to assist her attorney in a rational and reasonable manner. Given that she presently has a better idea of the nature of her diagnosis, and further, that it is possible to bring about better control over the "switching" and dissociation process, and, given that we are now able to obtain a "coherent" memory for events surrounding the offense, in my opinion, there is a reasonably good prognosis that with further treatment of her DID she will be able to attain competency to stand trial.

2. With respect to the issue of Criminal Responsibility, based on my review of these charges and my knowledge of this patient and the impact upon cognitive and affective mental states resulting from this type of mental disorder, it is my opinion that she suffered from a condition of "mental illness" as defined by law. Further, it is my opinion that as a result of this "mental illness" she was unable to conform her behavior to the requirements of law. Therefore, in my opinion she would have been legally insane at the time of committing these offenses and therefore I would recommend her to be adjudicated Not Guilty By Reason of Insanity.

3. As to the issue of a diminished capacity defense, all of the basic elements contained within a "mental state reconstruction" of defendant's "state of mind" at the time of these offenses which were applied to the above conclusions regarding "mental illness" and "legal insanity", would be applicable to and potentially helpful in assisting the court in assessing defendant's "specific intent". Therefore, it is probable that the trier of fact might find that she was "diminished in capacity".

In closing, I sincerely hope that this information is useful in assisting you to help Ms. McSwain. If you have any questions or concerns, or wish me to elaborate on any of my findings or opinions, please do not hesitate to contact me at 313-963-8597. I wish to thank you for this highly interesting and challenging referral, and I look forward to working with you on this case.

Yours very truly,

s/ Steven R. Miller, Ph.D, L.P.
Steven R. Miller, Ph.D., L.P.

Vita of

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Occupational Objectives

To work closely with organizations whose central purpose is to promote the mental well being and quality of life in the community.

Experience Highlights

January 1985 to present: DIRECTOR: MICHIGAN INSTITUTE FOR FORENSIC-CLINICAL-NEUROPSYCHOLOGY

Private Practice in Consulting Forensic Psychology and Clinical Psychotherapy. Practice is divided approximately equally between these two psychological disciplines. Private practice in forensic and clinical psychology, individual and family psychological assessment. Individual, marital, family, group and child psychotherapy. Specialization in civil, criminal and family court (child custody/visitation family assessment) evaluation and treatment. Sub-specialty related to evaluation of all types of sex assaults, false allegations of sexual abuse and the assessment of families involved in child custody dispute where allegations of sexual abuse have been made by one of

the parties. Additionally, and expert in the assessment and treatment of individuals and/or families with addiction problems (alcohol, drug, gambling and sexual addictions).

CONSULTING FORENSIC PSYCHOLOGICAL SERVICES

+ Criminal Responsibility
+ Diminished Capacity/Intoxication
+ Amnesia & Dissociation
+ Competency to Stand Trial
+ Competency to Understand Miranda
+ Voluntariness of Confession & Miranda Waiver
+ Presentence Reports
+ Juvenile Sentencing Assessment
+ Driver License Restoration Appeals
+ Workmen's Compensation
+ Personal Injury/Disability
+ Head Injury (Neuro-psychological)
+ Eye Witness Identification
+ Children's Memory and Testimony Reliability
+ "Repressed" Memory Syndrome
+ Sexual Deviancy
+ Sexual Assault/Sexual Harassment
+ Parole Risk and Dangerousness
+ False Allegations of Sexual Abuse
+ Probate Commitments
+ Battered Spouse Syndrome

+ Child Custody & Visitation

CLINICAL PSYCHOlOGICAL, PSYCHO-THERAPY PROGRAMS & SERVICES (AREAS OF SPECIALIZATION)

+ ADDICTIONS (Sexual, Gambling, Substance Abuse)

+ DISSOCIATIVE DISORDERS Multiple Personality Amnesia)

+ FAMILY THERAPY (Divorce/Visitation)

+ DOMESTIC VIOLENCE/INCEST FAMILY TREATMENT

+ ATTENTION DEFICIT DISORDER (Adults & Children)

+ VICTIMS OF SEXUAL & PHYSICAL ABUSE (Adults & Children)

+ POST-TRAUMATIC STRESS DISORDER

+ SEX & ASSAULTIVE OFFENDERS TREATMENT PROGRAM

+ DRIVER LICENSE RESTORATION TREATMENT PROGRAM

+ PSYCHOLOGICAL TESTING (Personality, Neuropsychology, etc.)

+ MEMORY ASSESSMENT (Children, Adults, Seniors)

Criminal Responsibility / Diminished Capacity / Intoxication/Competency to Stand Trial: Dr. Miller has over 16 years of experience in conducting criminal "mental state" evaluations pertaining to issues of legal insanity, intoxication, amnesia, and

cognitive impairment due to brain injury or developmental disorders. I have been recognized throughout the state as a leading expert in diminished capacity evaluations. I have testified in excess of 500 times in criminal forensic matters and I have been accepted as an expert in forensic psychology in nearly every county in Michigan and also in Ohio, Illinois, Pennsylvania, New York, Wisconsin and Florida, have a state certification as a Consulting Forensic Examiner, which I earned while working for the State of Michigan, Judicial Council, Recorder's Court Psychiatric Clinic a state certified forensic center (see below).

Competence to Understand Miranda/Voluntariness of Confession: Have conducted several hundred evaluators or defendants capacity to understand Miranda Waiver and as to the use of psychological coercive techniques by interrogating investigators. I have participated in several hundred "Walker Hearings."

Presentence Reports Adults/Juvenile Sentencing Disposition Recommendations/Sex Offender Risk Assessment: I have completed over two thousand psychological evaluations regarding diagnosis, treatability, dangerousness rehabilitation, and prognosis of defendants and have made general and specific sentence recommendations for courts throughout Michigan.

Workmen's Compensation/Personal Injury (i.e., psychological and/or neuro-pscyhological/Social Security Disability/Medical Disability/Probate

Commitment: Have conducted in excess of a thousand assessments of various psychological disabilities as they related to issues of capacity to work rehabilitation potential extent of cognitive capacity loss and need for treatment.

Eye Witness Identification Issues: Have testified as an expert for the defense relative to the vagaries of eye witness identification (i.e., affects of stress on memory recall cross-racial on memory recall cross-racial identification problems, weapons focus issues, line-up.

Memory Issues (amnesia, children's memory recall capacity, "repressed memory recall", disassociation and memory, dementia): I have made an extensive study of memory and consciousness with a focus on issues of memory storage recall psychological repression and disassociation as they key factors relate to matters of criminal, civil and probate litigation. I have been recognized as an expert with regard to psychogenic and intoxication amnesia, "repressed sexual abuse memories", children's vulnerability to suggestion and their cognitive limitations relative to recall and testimony and in cases of Multiple Personality Disorder (i.e. affects of the dissociation process on memory recall).

Domestic Violence/"Battered Spouse Syndrome": I have conducted in excess of a thousand evaluations of domestic violence in both criminal and family court cases. Have testified numerous times as to how to

identify the syndrome and with respect to the mental states of the parties.

Driver's License Appeals: I have routinely conducted evaluations for the court and for defendant's who require an assessment for alcohol abuse or related issues pertaining to legal appeals to reinstate their drivers license. I offer a comprehensive assessment and treatment program for this population

Sex Crimes/Incest/Sexual Harassment At Work/Victims of Sexual Abuse/False Allegations of Sexual Assault: I am recognized through the State as a leading expert and consultant in the assessment of sexual deviancy and addiction, risk assessment of sex offenders, sexual harassment in the work place and injury assessment in victims of sexual assault. To date I have conducted in excess of 3500 evaluations of such cases and have testified in hundreds of criminal and civil litigations relative to sexual assault. Developed a comprehensive treatment program for those sexually addicted and for sex offenders placed on probation or parole and have consulted to other sated agencies, such as the Department of Corrections. State Mental Health Services, Probation and Parole Agents, and the like, in terms of developing and coordinating the implementation and delivery of assessment and treatment services to these populations.

September 1979 to May 1969

State of Michigan, Judicial Council, Recorders Court Psychiatric Clinic Certified Forensic Facility, Frank

Murphy Hall of Justice, 1441 St. Antoine Street, Detroit, Michigan 48226

Senior Clinical Psychologist/Senior Forensic Consulting Examiner

Responsible for the psychological assessment and investigation of criminal cases of probationers and prisoners and the preparation of comprehensive psychological reports for the judges, attorneys, probation officers and other interested persons who work in the Wayne County Michigan court system, which has one of the largest criminal dockets in the United States. Types of evaluations routinely conducted include the following, criminal responsibility, diminished capacity, sex crimes, competency to stand trial, presentence and bond recommendations, competency to understand Miranda rights, traffic court and group psychotherapy screening. Supervised graduate students in clinical counseling and marriage and family psychology educational programs. Administered scored and interpreted a broad range of cognitive, neuro-psychological, family and personality objective and projective tests. Pioneered the development of a specialized treatment program for sex offenders on probation (begun in 1961 and continuing to date). Spearheaded the design, development and implementation of computer programs and an automated office system for intake screening, psychological testing and authorization with computerized "expert systems."

Volunteer Experience

1986 to 1989 *Grosse the Recreation Commission*
Served as the Commission Chairman. Developed recreation programs for the Grosse the community.

1979 to 1969 *Michigan Council on Compulsive Gambling*

Executive director of the Council which helps to educate the public and provide a referral service for individuals and famines having problems caused by a family members compulsive gambling.

1972 to 1973 *Volunteer Psychology Department, VA Hospital, Allen Park, Michigan*

Counseling veterans convalescing at the hospital under the supervision of the Psychology Department.

Education

Wayne State University
College of Education
Detroit, Michigan 48201

November 1986 **Ph. D. Degree Counseling Psychology**
Graduated with Highest Honors.

Courses in clinical, counseling, vocational educational, development (child), marriage and family psychology. Special emphasis in marriage and family assessment. Dissertation on the family crisis of pathological gambling.

Data collected for the dissertation utilized a variety of standardized marital and family assessment theories, techniques and last instruments.

March 1978 **M.A. Degree (Adult/Agency) Counseling Psychology**

Graduated and Highest Honors, Courses in clinical, counseling, vocational educational, marriage and family psychology.

Monteith College

Wayne State University

Detroit, Michigan 48201

June 1973 **Ph.B. Degree General Major**

Graduated with Highest Honors (3.86 GPA) Ranked among the top five students in a class of over 250 Experimental college emphasizing independent study and individual initiative, course in humanities, social science, science and psychology.

Specialized Training

September 1975 to 1979 **Internship in Psychology:**

Wayne State University, Psychological and Counseling Services

334 Mackenzie Hall

Detroit, Michigan 48201

This facility is a combined mental health and career/academic counseling service. Duties included psychological testing and counseling of college students. Trained in the administration of a wide variety of educational, vocational and personality tests. Also gained experience in individual and family crisis intervention.

1975-1981 **Psychoanalytic Training**

Mid-West Psychoanalytic Institute
625 Purdy Street
Birmingham, Michigan

Five years of seminars and supervised treatment experience (over 750 clock hours) with senior psychoanalysts. Training in psychoanalytic theory, child development and treatment techniques (adult and child), both classical and modern forms. Presently Diplomat eligible in Professional Psychology (Psychoanalytic Psychology) with the American Psychological Association.

Professional Conference Presentations & Papers

Michigan Association for Alcoholism and Addictions Annual Conference, 1984: Presented paper and conducted work-

shop concerning assessment and treatment of pathological gambling.

Third Annual Conference On Pathological Gambling, 1987:

Presented paper summarizing dissertation data.

Criminal Advocacy Programs, Recorder's Court, Detroit, Michigan: Conference on Diminished Capacity, 1988:

Presented paper and workshop on assessment of Diminished Capacity.

Washtenaw County Public Defender's, 1988: Conducted workshop on Case Assessment of Sex Crimes.

Michigan Association For Alcoholism and Addictions Annual Conference, 1994: Workshop Presentation on Risk Assessment and Treatment of Sex Offenders.

Television Appearances

Kelly and Company, WXYZ TV. Gambling Addiction

A.M. in Detroit (twice). Gambling Addiction

Talk of the Town (twice). Gambling Addiction

Talk of the Town (three). Sexual Addiction/Sex Crimes.

Professional Organizations

American Psychological Association,

National Association of Sexual Addiction Problems

National Council on Problem Gambling

International Society for the Study of Multiple Personality and Association

License and Certification

Fully Licensed Psychologist Michigan

Certified Consulting Forensic Examiner.

CLINICAL INTERVIEW EVALUATION REPORT

Name:	Rose Marie McSwain
Dates of Evaluation:	5-20-97 and 6-2-97
Report Date:	8-15-97
Measures Used:	Structured Clinical Interview for DSM—Dissociative Disorders[i]
	Dissociative Experiences Scale[ii]
	Distressing Event Questionnaire[iii]

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[i] The Structured Clinical Interview for DSM-Dissociative Disorders is a comprehensive semistructured interview and evaluation instrument which is designed 10 enable the accurate and reliable diagnoses of the dissociative disorders, including Dissociative Identity Disorder. Research studies have shown that the SCID-D has good to excellent reliability and validity. (Steinberg. M. Structured Clinical Interview for DSM-IV Dissociative Disorders [SCID-D]. Washington, DC *American Psychiatric Press*, 1993, 1996 (Revised).

[ii] The Dissociative Experiences Scale is a self-report measure which is designed to in part to assess dissociative experiences in both psychiatric and non-psychiatric populations. It was designed in part as a screening instrument for dissociative disorders. It can be used independently or in conjunction with a clinical interview. It has been extensively studied and yields consistently high indices of statistical reliability and validity. (Carlson, E. B. and Putnam, F. An Update on the Dissociative Experiences Scale. *Dissociation*, VI, 16-27, 1993.

[iii] The Distressing Event Questionnaire was designed as a self-report screening instrument to identify symptomatic and historical information pertinent to Posttraumatic Stress Disorder. It is intended to be used in conjunction with a clinical interview. (Pielack. L., Distressing Even Questionnaire. 1993)

Clinical Interview

History: Ms. McSwain is a 29 year old woman of African American descent. She reports being near completion of Associates degrees in Dental Technology, Graphic Arts, and as a Para-legal professional. She is single but describes herself as "married" to a female partner. She resides in Huron Valley Correctional Facility where she is serving a life sentence for murder. She has two children, ages 13 and 10. Prior to her internment she was a prostitute and "stripper".

Ms. McSwain reported her first psychiatric treatment experience at age 12, when her mother admitted her to inpatient treatment at Pine Rest due to her behavior. She was in inpatient and also apparently outpatient therapy around age 18 when she was intensely suicidal. She also was briefly treated for cocaine abuse at Glen Bay at around age 19, and she describes an intermittent problem with alcohol abuse at that time as well. She indicated that she had a significant problem with depression during her teenage years, when she stated she had lived in and out of several foster homes. Her mother apparently had serious problems with drug and alcohol abuse throughout Rose Marie's childhood and suffered from Major Depression. Of her siblings (half brother and sister) she stated, "they're all psychotic".

Ms. McSwain reported a significant history of childhood sexual and physical abuse at the hands of several adults, primarily her stepfather and mother. She described a chaotic and dangerous childhood and stated that from around the age of 3 she had imaginary friends who were "like angels" and protected her.

Description of Clinical Interview: Ms. McSwain came to the interview with initial hesitation but was cooperative and gradually appeared more comfortable with the interviewer and process. She was dressed neatly and oriented X3, The Dissociative Experiences Scale and Distressing Event Questionnaire (both self-report measures) were administered immediately prior to the clinical interview, The Structured Clinical Interview for DSM-Dissociative Disorders was administered during the first part of the interview, which was conducted over two meetings. Following the administration of the SCID-D, Ms. McSwain was willing and cooperative to continue the clinical interview for the purpose of clarifying various clinical issues relative to her criminal case. The interview was audiotaped as well as videotaped.

Findings: Ms. McSwain's score on the DES was 67.5 (cutoff score for severe dissociative disorders and Dissociative Identity Disorder is 30). Her responses on the DEQ were significant. Her score on the SCID-D was 20 (Scores of 17-20 indicate Dissociative Identity Disorder). Based on these measures and the clinical interview, Ms. McSwain meets criteria for Dissociative Identity Disorder as well as Posttraumatic Stress Disorder. The essential features of Dissociative Identity Disorder involve the existence within an individual of two or more distinct identities or personality states that recurrently take control of the individual's behavior. A person suffering from this disorder also experiences an inability to recall important personal information that is too extensive to be explained by ordinary forgetfulness (amnesia). The essential characteristics of Posttraumatic Stress Disorder include the reexperiencing of an extremely traumatic event

accompanied by symptoms of increased physiological arousal and by avoidance of stimuli associated with the trauma. It is common for these disorders to co-occur; however in Ms. McSwain's case, Dissociative Identity Disorder accounts for the majority of her symptoms and functioning. It should be noted that she may respond to situations of sufficient stress and anxiety (which could be stimulated by posttraumatic stress reactions) by presenting an altered identity.

Background Information: Ms. McSwain's presentation of herself prior to and during the interview reflected her internal experience of having many distinct identities. These identities have different names, sexes, ages, internal physical images, mannerisms, tones of voice/figures of speech, postures, behaviors, associated memories and emotional states, motivations, and particular functions or roles with regard to the individual as a whole. As is true in many individuals with this disorder, these distinct identities sometimes are aware of each other and can "observe" the individual's behavior and external environment; at other times, however, they may be completely unaware of another identity's behavior, their surroundings, or continuity of experience and memory. They may experience internal conflict and disagreement (both explicit and implicit) over motivations and goals, and methods of achieving objectives. This can result in apparent ambivalence in attitude, external behavior which can be inconsistent or in marked contrast from one moment or time period to another, or confused presentation. In Ms. McSwain's case, she presented several alter identities at the time of the interview, including "Gemini Dark", who is a shy male personality state

with highly ritualized behavior, who was uncertain and anxious about the tape recording and video equipment being present, and who is responsible for going to dental classes (which "Bambi" stated were boring to her); "Rose", who was described by other identities as being a young child, and who made a sudden request to color with the markers she saw with the interviewer; "Bambi", who described herself as having the function of "taking care of business", yet being empathic, easy going, able to get along with others well, and who uses prescription lenses; "Lucy", who was described by "Bambi" as being "mean", "nasty", and otherwise being "bad", but who described herself as "doing what has to be done" in tough situations which no other identity wants to deal with, and who presented herself in a somewhat confrontational and challenging way and doesn't use prescription lenses; and "Rose Marie", who presented herself as a vulnerable, tearful, traumatized, depressed identity, whom both "Bambi" and "Lucy" described as a teenaged girl who had experienced repeated beatings and sexual abuse by Rose Marie's stepfather as well as several other men from childhood on into her adult life, am who was constantly suicidal. "Bambi" indicated that she and "the others" had to keep a close watch on "Rose Marie" for this reason, and that she was rarely "out". "Bambi" also stated that "Lucy's" way of handling problems was too harsh or extreme, and that she ("Bambi") felt that "Lucy" was wrong, preferring, as did many of the others, a calmer approach. "Lucy", however, felt that many situations demand an aggressive response to keep others in the environment from mistreating or exploiting Ms. McSwain.

Various internal identities can have occasional or ongoing awareness of the external or internal environment (although their presence can be unknown to the individual). When internal or external situational demands change, an internal identity state which is associated with the demand characteristics of the situation may "emerge", "take control", and adopt executive control directing the individual's behavior or responses. This change is often experienced as automatic, and without the individual feeling able to direct or control the outcome. There can be varying degrees of amnesia between separate alternate identities, and partial or complete amnesia between alternate identities and the person's primary ("host") identity. For example, in Ms. McSwain's case, "Bambi" reported early on that "Lucy" was observing our interview but did not want to "be" there; instead, she said, it fell to her ("Bambi") to try to answer the questions. Some answers she knew from direct experience: some she knew secondhand, by observing others' activities; and some she had been "told" about by other identities. In some cases she was unable to answer questions because of amnesia for the material in question. At times in the interview, information not fully available to one identity could sometimes be provided by another, who might spontaneously emerge based on the material being discussed. At one point, "Bambi" was telling of a previous interview with a psychiatrist who had slammed his hand on the desk and yelled, apparently frightening one of the childlike identities to whom he was talking. At this point, she stated, "Lucy" emerged to respond to the perceived threat. As "Bambi" was explaining to me that "we had to hold her back", "Lucy" spontaneously presented

herself in "Bambi's" place to elaborate on her side of the story and continue the interview. In contrast with "Bambi's" easy going attitude and presentation, "Lucy's" posture, figures of speech, and manner of presentation was angry, indignant, suspicious, and self-protective.

With partial amnesia or dissociation, the person can experience helplessness or feel he or she is "made" to do things or say things; or can feel like a distant observer watching him or herself behave in particular ways that seem completely foreign to their usual sense of self; or can have only selective awareness of his/her interaction with the environment. With more complete amnesia, the individual has limited or no information about events during these state changes. These periods are experienced as "lost time" or "black outs". He or she can suddenly become aware in a situation but have no memory of how he/she came to be in this setting, what has been going on around him/her, or what behavior may be called for at the time. These sudden awarenesses can be accompanied by a sense of fogginess or confusion as the individual attempts to gather environmental information and decide on appropriate responses. Ms. McSwain described a number of experiences in which she suddenly found herself in a situation without foreknowledge about the circumstances related to it. She told me of recently becoming aware as she was standing at a wall in a hospital room, crying and crouching, apparently having been frightened and having no idea where she was, how she got there or what events had brought about her situation. She later gathered that she had been sent to the psychiatric facility because of her behavior, and had been there for some

time. She also described another incident in which she found herself crouched in a fetal position inside a metal locker, unaware that she had climbed in it, and stated that she couldn't understand how she could have even frit her body into it.

The overt presentation of an individual with Dissociative Identity Disorder can reflect disorientation and confusion, which can be inaccurately assumed to reflect a psychotic process. "Rapid switching" is a phenomenon which refers to an especially chaotic fluctuation of identities with little sense of continuity of time, events, or memory. It can occur under situations of particularly extreme stress or danger; or it can occur due to medication mismanagement, or during periods of substance abuse. During such experiences, the individual has difficulty "holding" one identity, set of perceptions and awarenesses, objectives, or continuity of consciously directed behavior. He or she can subjectively feel as though he/she is "blacking out" repeatedly while the setting around them and its demands shift between brief periods of awareness, such that the environment needs to be repeatedly assessed. If events in the environment are changing quickly, the individual may have incomplete or disorganized information upon which to base his/her responses to environmental demands. Externally, they can be perceived to rapidly oscillate in demeanor and behavior with apparent instability and panic. As abovementioned, the alterations in presentation are commonly misunderstood as psychotic in nature. Yet one of the distinguishing features of Dissociative Identity Disorder is that individuals characteristically have intact reality testing which is not present in psychosis (even during periods of rapid

switching, which in effect reduces the information they have to base their reactions upon). They experience a significant amount of distress with their disorder and perceive the identity alterations as solely internal/subjective phenomena. Ms McSwain. for example, maintained intact reality testing throughout the interview and did not show evidence of a thought disorder. The "voices" that she reports hearing are perceived as internal ones with characteristic attitudes, values, memories, emotional tone, etc., rather than as external stimuli coming from objects such as may be evident in persons with psychotic disorders. This is another characteristic which distinguishes Dissociative Identity Disorder from the psychoses.

Persons with Dissociative Identity Disorder often attempt to hide their symptoms from others and usually develop various styles of adaptation to the symptoms they experience, which can be almost undetectable to others. Depending on their success at functional adaptations, they may never be diagnosed or seek treatment. However it is not uncommon for individuals with these disorders to have long psychiatric histories, sometimes with various diagnoses and attempts at treatment. Although accurate diagnosis may eventually occur, a symptomatic history consistent with the later diagnosis is often present. It is also common for these individuals to have histories of substance abuse. However, another distinguishing characteristic of Dissociative Identity Disorder is that the symptoms are independent of substance abuse or intoxication. In Ms. McSwain's case, her history includes most of these elements. She stated that she did not "know" she had a problem until a couple of

years ago; she thought everyone functioned in a similar manner. Although roommates and close friends have commented on her changeableness, etc., she does not share what it is really like for her with very many people. This interview was seen by her as her opportunity to be understood and take the risk to be as open as possible about herself. Even so, it should be mentioned that she was guarded and only revealed the degree of her symptoms as the interview continued and she apparently felt understood.

Dissociative Disorders have been increasingly studied over the past two decades. Careful clinical research and improved methods have yielded a great deal of information regarding the etiology, course, and treatment of this disorder. The presence of chronic physical, emotional, or sexual trauma which overwhelms the individual, almost always during early childhood development appears consistently in the histories of individuals with Dissociative Identity Disorder. Aspects of the traumatic experiences are believed to become encapsulated within the individual, and become associated with various identities/altered states. Partial or complete amnesia can accompany these encapsulations. As the individual grows up and matures, new incoming information may be sorted and stored in such a way as to maintain the encapsulation and amnesia. Various identities may experience events in a punctuated sense over a whole lifetime, often being unaware of external events for years at a time. New identities can develop after childhood, but generally do so in response to specific stressors or situations which overwhelm the individual's existing coping system. For example, Ms. McSwain's childhood history is consistent with the types of ongoing trauma

which are associated with approximately 96% of the cases of Dissociative Identity Disorder. Some of her identities have been "around" for many years. "Rose", who was variously described as a young child of 3 or 4 and an older child of 7 or 8, was described by "Bambi" as knowing the most about Ms. McSwain, having been in existence the longest. "Bambi" herself did not exist before about age 19, according to Ms. McSwain. "Lucy" stated she came to be during a particularly brutal rape of Ms. McSwain by her stepfather when she was young, in essence stating, "I saw her crying and all alone going through that and I decided then and there to get involved".

In summary, this interviewer found Ms. McSwain to present credible evidence of symptoms and experiences which are indicative of Dissociative Identity Disorder. This included both overt and subtle consistencies in the presentation of clinical signs and material over a lengthy interview. In addition, she meets criteria for an additional diagnosis of Posttraumatic Stress Disorder.

s/ Leslie K. Pielack

Leslie K. Pielack, MA,

Certified Social Worker

Licensed Professional Counselor

CLINICAL INTERVIEW EVALUATION REPORT

Name:	Rose Marie McSwain
Dates of Evaluation:	5-20-97 and 6-2-97
Report Date:	8-15-97
Measures Used:	Structured Clinical Interview for DSM—Dissociative Disorders[1]
	Dissociative Experiences Scale[2]
	Distressing Event Questionnaire[3]

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[1] The Structured Clinical Interview for DSM-Dissociative Disorders is a comprehensive semistructured interview and evaluation instrument which is designed 10 enable the accurate and reliable diagnoses of the dissociative disorders, including Dissociative Identity Disorder. Research studies have shown that the SCID-D has good to excellent reliability and validity. (Steinberg. M. Structured Clinical Interview for DSM-IV Dissociative Disorders [SCID-D]. Washington, DC *American Psychiatric Press,* 1993, 1996 (Revised).

[2] The Dissociative Experiences Scale is a self-report measure which is designed to in part to assess dissociative experiences in both psychiatric and non-psychiatric populations. It was designed in part as a screening instrument for dissociative disorders. It can be used independently or in conjunction with a clinical interview. It has been extensively studied and yields consistently high indices of statistical reliability and validity. (Carlson, E. B. and Putnam, F. An Update on the Dissociative Experiences Scale. *Dissociation,* VI, 16-27. 1993.

[3] The Distressing Event Questionnaire was designed as a self-report screening instrument to identify symptomatic and historical information pertinent to Posttraumatic Stress

Clinical Interview

History: Ms. McSwain is a 29 year old woman of African American descent. She reports being near completion of Associates degrees in Dental Technology, Graphic Arts, and as a Para-legal professional. She is single but describes herself as "married" to a female partner. She resides in Huron Valley Correctional Facility where she is serving a life sentence for murder. She has two children, ages 13 and 10. Prior to her internment she was a prostitute and "stripper".

Ms. McSwain reported her first psychiatric treatment experience at age 12, when her mother admitted her to inpatient treatment at Pine Rest due to her behavior. She was in inpatient and also apparently outpatient therapy around age 18 when she was intensely suicidal. She also was briefly treated for cocaine abuse at Glen Bay at around age 19, and she describes an intermittent problem with alcohol abuse at that time as well. She indicated that she had a significant problem with depression during her teenage years, when she stated she had lived in and out of several foster homes. Her mother apparently had serious problems with drug and alcohol abuse throughout Rose Marie's childhood and suffered from Major Depression. Of her siblings (half brother and sister) she stated, "they're all psychotic".

Ms. McSwain reported a significant history of childhood sexual and physical abuse at the hands of several adults, primarily her stepfather and mother.

Disorder. It is intended to be used in conjunction with a clinical interview. (Pielack, L., Distressing Even Questionnaire, 1993)

She described a chaotic and dangerous childhood and stated that from around the age of 3 she had imaginary friends who were "like angels" and protected her.

Description of Clinical Interview: Ms. McSwain came to the interview with initial hesitation but was cooperative and gradually appeared more comfortable with the interviewer and process. She was dressed neatly and oriented X3, The Dissociative Experiences Scale and Distressing Event Questionnaire (both self-report measures) were administered immediately prior to the clinical interview, The Structured Clinical Interview for DSM-Dissociative Disorders was administered during the first part of the interview, which was conducted over two meetings. Following the administration of the SCID-D, Ms. McSwain was willing and cooperative to continue the clinical interview for the purpose of clarifying various clinical issues relative to her criminal case. The interview was audiotaped as well as videotaped.

Findings: Ms. McSwain's score on the DES was 67.5 (cutoff score for severe dissociative disorders and Dissociative Identity Disorder is 30). Her responses on the DEQ were significant. Her score on the SCID-D was 20 (Scores of 17-20 indicate Dissociative Identity Disorder). Based on these measures and the clinical interview, Ms. McSwain meets criteria for Dissociative Identity Disorder as well as Posttraumatic Stress Disorder. The essential features of Dissociative Identity Disorder involve the existence within an individual of two or more distinct identities or personality states that recurrently take control of the individual's behavior. A person suffering from this disorder also experiences an

inability to recall important personal information that is too extensive to be explained by ordinary forgetfulness (amnesia). The essential characteristics of Posttraumatic Stress Disorder include the reexperiencing of an extremely traumatic event accompanied by symptoms of increased physiological arousal and by avoidance of stimuli associated with the trauma. It is common for these disorders to co-occur; however in Ms. McSwain's case, Dissociative Identity Disorder accounts for the majority of her symptoms and functioning. It should be noted that she may respond to situations of sufficient stress and anxiety (which could be stimulated by posttraumatic stress reactions) by presenting an altered identity.

Background Information: Ms. McSwain's presentation of herself prior to and during the interview reflected her interr al experience of having many distinct identities. These identities have different names, sexes, ages, internal physical images, mannerisms, tones of voice/figures of speech, postures, behaviors, associated memories and emotional states, motivations, and particular functions or roles with regard to the individual as a whole. As is true in many individuals with this disorder, these distinct identities sometimes are aware of each other and can "observe" the individual's behavior and external environment; at other times, however, they may be completely unaware of another identity's behavior, their surroundings, or continuity of experience and memory. They may experience internal conflict and disagreement (both explicit and implicit) over motivations and goals, and methods of achieving objectives. This can result in apparent ambivalence in attitude, external behavior which can be

inconsistent or in marked contrast from one moment or time period to another, or confused presentation. In Ms. McSwain's case, she presented several alter identities at the time of the interview, including "Gemini Dark", who is a shy male personality state with highly ritualized behavior, who was uncertain and anxious about the tape recording and video equipment being present, and who is responsible for going to dental classes (which "Bambi" stated were boring to her); "Rose", who was described by other identities as being a young child, and who made a sudden request to color with the markers she saw with the interviewer; "Bambi", who described herself as having the function of "taking care of business", yet being empathic, easy going, able to get along with others well, and who uses prescription lenses; "Lucy", who was described by "Bambi" as being "mean", "nasty", and otherwise being "bad", but who described herself as "doing what has to be done" in tough situations which no other identity wants to deal with, and who presented herself in a somewhat confrontational and challenging way and doesn't use prescription lenses; and "Rose Marie", who presented herself as a vulnerable, tearful, traumatized, depressed identity, whom both "Bambi" and "Lucy" described as a teenaged girl who had experienced repeated beatings and sexual abuse by Rose Marie's stepfather as well as several other men from childhood on into her adult life, am who was constantly suicidal. "Bambi" indicated that she and "the others" had to keep a close watch on "Rose Marie" for this reason, and that she was rarely "out". "Bambi" also stated that "Lucy's" way of handling problems was too harsh or extreme, and that she ("Bambi") felt that "Lucy" was wrong, preferring, as

did many of the others, a calmer approach. "Lucy", however, felt that many situations demand an aggressive response to keep others in the environment from mistreating or exploiting Ms. McSwain.

Various internal identities can have occasional or ongoing awareness of the external or internal environment (although their presence can be unknown to the individual). When internal or external situational demands change, an internal identity state which is associated with the demand characteristics of the situation may "emerge", "take control", and adopt executive control directing the individual's behavior or responses. This change is often experienced as automatic, and without the individual feeling able to direct or control the outcome. There can be varying degrees of amnesia between separate alternate identities, and partial or complete amnesia between alternate identities and the person's primary ("host") identity. For example, in Ms. McSwain's case, "Bambi" reported early on that "Lucy" was observing our interview but did not want to "be" there; instead, she said, it fell to her ("Bambi") to try to answer the questions. Some answers she knew from direct experience; some she knew secondhand, by observing others' activities; and some she had been "told" about by other identities. In some cases she was unable to answer questions because of amnesia for the material in question. At times in the interview, information not fully available to one identity could sometimes be provided by another, who might spontaneously emerge based on the material being discussed. At one point, "Bambi" was telling of a previous interview with a psychiatrist who had slammed his hand on the desk and yelled,

apparently frightening one of the childlike identities to whom he was talking. At this point, she stated, "Lucy" emerged to respond to the perceived threat. As "Bambi" was explaining to me that "we had to hold her back", "Lucy" spontaneously presented herself in "Bambi's" place to elaborate on her side of the story and continue the interview. In contrast with "Bambi's" easy going attitude and presentation, "Lucy's" posture, figures of speech, and manner of presentation was angry, indignant, suspicious, and self-protective.

With partial amnesia or dissociation, the person can experience helplessness or feel he or she is "made" to do things or say things; or can feel like a distant observer watching him or herself behave in particular ways that seem completely foreign to their usual sense of self; or can have only selective awareness of his/her interaction with the environment. With more complete amnesia, the individual has limited or no information about events during these state changes. These periods are experienced as "lost time" or "black outs". He or she can suddenly become aware in a situation but have no memory of how he/she came to be in this setting, what has been going on around him/her, or what behavior may be called for at the time. These sudden awarenesses can be accompanied by a sense of fogginess or confusion as the individual attempts to gather environmental information and decide on appropriate responses. Ms. McSwain described a number of experiences in which she suddenly found herself in a situation without foreknowledge about the circumstances related to it. She told me of recently becoming aware as she was standing at a wall in a hospital room, crying and crouching,

apparently having been frightened and having no idea where she was, how she got there or what events had brought about her situation. She later gathered that she had been sent to the psychiatric facility because of her behavior, and had been there for some time. She also described another incident in which she found herself crouched in a fetal position inside a metal locker, unaware that she had climbed in it, and stated that she couldn't understand how she could have even fit her body into it.

The overt presentation of an individual with Dissociative Identity Disorder can reflect disorientation and confusion, which can be inaccurately assumed to reflect a psychotic process. "Rapid switching" is a phenomenon which refers to an especially chaotic fluctuation of identities with little sense of continuity of time, events, or memory. It can occur under situations of particularly extreme stress or danger; or it can occur due to medication mismanagement, or during periods of substance abuse. During such experiences, the individual has difficulty "holding" one identity, set of perceptions and awarenesses, objectives, or continuity of consciously directed behavior. He or she can subjectively feel as though he/she is "blacking out" repeatedly while the setting around them and its demands shift between brief periods of awareness, such that the environment needs to be repeatedly assessed. If events in the environment are changing quickly, the individual may have incomplete or disorganized information upon which to base his/her responses to environmental demands. Externally, they can be perceived to rapidly oscillate in demeanor and behavior with apparent instability and panic. As abovementioned, the alterations in presentation are

commonly misunderstood as psychotic in nature. Yet one of the distinguishing features of Dissociative Identity Disorder is that individuals characteristically have intact reality testing which is not present in psychosis (even during periods of rapid switching, which in effect reduces the information they have to base their reactions upon). They experience a significant amount of distress with their disorder and perceive the identity alterations as solely internal/subjective phenomena. Ms McSwain, for example, maintained intact reality testing throughout the interview and did not show evidence of a thought disorder. The "voices" that she reports hearing are perceived as internal ones with characteristic attitudes, values, memories, emotional tone, etc., rather than as external stimuli coming from objects such as may be evident in persons with psychotic disorders. This is another characteristic which distinguishes Dissociative Identity Disorder from the psychoses.

Persons with Dissociative Identity Disorder often attempt to hide their symptoms from others and usually develop various styles of adaptation to the symptoms they experience, which can be almost undetectable to others. Depending on their success at functional adaptations, they may never be diagnosed or seek treatment. However it is not uncommon for individuals with these disorders to have long psychiatric histories, sometimes with various diagnoses and attempts at treatment. Although accurate diagnosis may eventually occur, a symptomatic history consistent with the later diagnosis is often present. It is also common for these individuals to have histories of substance abuse. However, another distinguishing

characteristic of Dissociative Identity Disorder is that the symptoms are independent of substance abuse or intoxication. In Ms. McSwain's case, her history includes most of these elements. She stated that she did not "know" she had a problem until a couple of years ago; she thought everyone functioned in a similar manner. Although roommates and close friends have commented on her changeableness, etc., she does not share what it is really like for her with very many people. This interview was seen by her as her opportunity to be understood and take the risk to be as open as possible about herself. Even so, it should be mentioned that she was guarded and only revealed the degree of her symptoms as the interview continued and she apparently felt understood.

Dissociative Disorders have been increasingly studied over the past two decades. Careful clinical research and improved methods have yielded a great deal of information regarding the etiology, course, and treatment of this disorder. The presence of chronic physical, emotional, or sexual trauma which overwhelms the individual, almost always during early childhood development appears consistently in the histories of individuals with Dissociative Identity Disorder. Aspects of the traumatic experiences are believed to become encapsulated within the individual, and become associated with various identities/altered states. Partial or complete amnesia can accompany these encapsulations. As the individual grows up and matures, new incoming information may be sorted and stored in such a way as to maintain the encapsulation and amnesia. Various identities may experience events in a punctuated sense over a whole lifetime, often being unaware of external events for years at a time. New

identities can develop after childhood, but generally do so in response to specific stressors or situations which overwhelm the individual's existing coping system. For example, Ms. McSwain's childhood history is consistent with the types of ongoing trauma which are associated with approximately 96% of the cases of Dissociative Identity Disorder. Some of her identities have been "around" for many years. "Rose", who was variously described as a young child of 3 or 4 and an older child of 7 or 8, was described by "Bambi" as knowing the most about Ms. McSwain, having been in existence the longest. "Bambi" herself did not exist before about age 19, according to Ms. McSwain. "Lucy" stated she came to be during a particularly brutal rape of Ms. McSwain by her stepfather when she was young, in essence stating, "I saw her crying and all alone going through that and I decided then and there to get involved".

In summary, this interviewer found Ms. McSwain to present credible evidence of symptoms and experiences which are indicative of Dissociative Identity Disorder. This included both overt and subtle consistencies in the presentation of clinical signs and material over a lengthy interview. In addition, she meets criteria for an additional diagnosis of Posttraumatic Stress Disorder.

s/ Leslie K. Pielack

Leslie K. Pielack, MA,

Certified Social Worker

Licensed Professional Counselor

CURRICULUM VITAE

Leslie K. Pielack

OFFICE ADDRESS	1112 Catalpa Royal Oak, MI 48067 (248) 398-7496
	1520 S. Lapeer Rd., Ste. 218 Lake Orion MI 48360 (248) 693-4629
HOME ADDRESS	75 Ridgemont Oxford, MI 48370 (248) 693-6765
PERSONAL DATA	Date of Birth: December 16, 1954 Martial Status: Married Spouse's Name: Lawrence Oshier Children: 2
EDUCATION	Oakland University 1978 Rochester, Michigan B.A. Psychology Double Major in Art and Art History Graduated Cum Laude

Oakland University 1987
Rochester, Michigan
M.A.
Counseling

Oakland University 1981-1983
Rochester, Michigan
Post Graduate Coursework
Invitational Seminar in Clinical Counseling Supervision

Post-Graduate Training 1981-
Workshops and seminars
(Min. 20 clock hours annually)

LICENSURE AND CERTIFICATION
Licensed Professional Counselor
State of Michigan 1989-

Certified Social Worker 1991-
State of Michigan

National Certified 1982-
Counselor
National Board of Certified Counselors

PROFESSIONAL AREA SUPERVISOR/PROGRAM

EXPERIENCE

COORDINATOR

Residential Systems Company

Ulica, MI

Responsibilities included the selection, training, and evaluation of direct care staff working with developmentally disabled adults and children. Developed inservice training programs for continuing education of direct care and administrative staff.

Acted as liaison between residential agency and state regulatory agencies to coordinate service delivery.

Responsible for ongoing individual client assessment and development and evaluation of residential treatment plans for developmentally disabled and dually diagnosed adults and children in six residential treatment facilities.

INSTRUCTOR 1985-1987

Mental Health Program

Macomb County Community College

Mt. Clemens, MI

Design and instruction of classes and personal evaluation of students in the Mental Health

Program. Areas taught included introductory concepts in the delivery of human services, group process, human interaction skills and interpersonal dynamics.

PRIVATE PRACTICE IN PSYCHOTHERAPY

TRAUMA RECOVERY CENTER 1996-

415 S. West St., Ste. 150

Royal Oak, MI

Counseling and CONSULTING practice including clinical evaluation of individuals, couples, and families; clinical work with adolescents and adults; parenting skins training and professional consultation.

Administrative duties: as Co-Director, contribute to the development, promotion, and coordination of services for trauma survivors; therapist training; provide clinical assessment and referral services; case consultation services; and coordinate research.

CENTER FOR FAMILY DEVELOPMENT 1984-1996

1112 Catalpa Royal Oak, MI

Counseling and consulting practice including clinical evaluation of individuals, couples, and families; clinical work with adolescents and adults; parenting skills training and professional consultation.

Administrative duties: as co-owner, held position as Chief Financial Officer (1988-1996), provided clinical assessment and referral services; and case consultation services.

LAKE ORION 1992-
PSYCHOLOGICAL SERVICES
1520 S. Lapeer Rd., Ste. 218
Lake Orion, MI 48360

Counseling and consulting practice including clinical evaluation and treatment of individuals, couples, and families; clinical work with adolescents and adults; parenting skills training and professional consultation

Administrative duties: as owner, hold position as Chief Financial Officer (1992-Present), provide consultation to public secondary schools and other community organizations.

CONSULTING

APPOINTMENTS

RENAISSANCE 1993-1997
PSYCHOLOGICAL RESOURCES

Birmingham and Detroit, Michigan

Detroit Police Deportment
Medical Section and Recruiting

Review psychological test data and interview candidates for police officer to screen and make

recommendations regarding the candidate's psychological suitability.

HAVENWYCK HOSPITAL
Auburn Hills, Michigan 1994-

Adult Psychiatric Inpatient Unit
Trauma and Dissociative Disorders Track

Non-Physician Provider Privileges

Designed and implemented special services for inpatients with trauma-related disorders and trained unit staff in special intervention techniques. Function as ongoing clinical consultant in the diagnosis and assessment, individual treatment, and staff consultation for inpatients with such disorders (e.g., post-traumatic stress

disorder, acute stress disorder and a range of dissociative disorders) as well as other inpatients whose trauma history is a significant factor in their hospitalization.

ADDITIONAL PROFESSIONAL EXPERIENCE

COMMUNITY EDUCATION COORDINATOR 1993-

International Society for the Study of Dissociation (formerly the International Society for the Study of Multiple Personality and Dissociation)

Southeast Michigan Chapter

Development of philosophy, goals, and strategies related to the following activities: continuing education/training of study group members; development of study group consultation services to the professional community in the identification and treatment of trauma-related disorders such as multiple personality and dissociative disorders; development of conferences to enhance professional understanding and treatment of these disorders; public relations.

CONFERENCE COORDINATOR
1994

First Annual Professional Conference co-sponsored by the ISSD (formerly ISSMP&O) Study Group of Southeast Michigan, entitled "Legacy of Trauma: Dissociation, Perpetration, and Multiple Personality Disorder", featuring Henry Krystal MD and Lawrence R. Klein, PhD

CONFERENCE CO-CHAIR 1995
Second Annual Professional Conference co-sponsored by the ISSd Study Group of Southeast Michigan, entitled "Legacy of Trauma: Diagnosis and Treatment of Dissociative Identity Disorder (Multiple Personality Disorder)", with Colin Ross, M.D.

CONFERENCE CO-CHAIR 1996
Third Annual Professional Conference co-sponsored by the ISSD Study Group of Southeast Michigan, entitled "Legacy of Trauma III: Trauma, Trance, and Treatment" with David Spiegel, M.D.

CONFERENCE
CO-DEVELOPMENT 1997
Fourth Annual Professional Conference sponsored by the ISSD) Study Group of Southeast Michigan, entitled "Legacy of Trauma IV; Trauma, Memory, and Disruption of Attachment", with Bessel van der Kolk, M.D.

CONFERENCE
CO-DEVELOPMENT 1998
Fifth Annual Professional Conference sponsored *by* the ISSD) Study Group of Southeast Michigan, entitled "Legacy of Trauma V: Psychological Trauma", with Judith L. Herman, M.D.

PROFESSIONAL DEVELOPMENT COORDINATOR 1997-Present
International Society for the Study of Dissociative/Trauma Study Group of Southeast Michigan.

Responsibilities include The initiation and coordination of professional development series for members of the study group.

CONTRIBUTING
EDITOR 1991-1995
The Advocate monthly newsletter for counseling professionals
Multiple Personality and Dissociation Special Interest Network column

American Menial Health Counseling Association
Alexandria, Virginia

Responsibilities included the editing of submitted manuscripts for, as well as the writing of, ten columns per year, addressing a variety of issues relating to the identification and treatment of dissociative identity (multiple personality) and other dissociative disorders.

OAKLAND COUNTY CRISIS RESPONSE TEAM 1997

Specialized training and voluntary membership in Critical Incident Stress Debriefing (CISD) team for community and individual de-briefing following disasters, workplace violence, and other critical incidents.

PRESENTATIONS Frequent presenter to

professionals in mental health and related fields on such topics as: child/adolescent development; assessment of pathological behavior in children and adolescents; childhood sexual and emotional trauma and its effects; adult syndromes of childhood abuse; identification and treatment of dissociative disorders and multiple personality (dissociative identity) disorder; borderline pathology; anxiety/panic disorders; and various issues relating to general principles of psychotherapy, including transference and countertransference; the therapeutic frame; working with parents; dreamwork; and metaphoric communication in psychotherapy.

Specialized curriculum development and teaching in 100-contact hour ongoing seminar series for the advanced training of mental health professionals working with trauma. Topics include managing crisis, understanding re-enactment behaviors, effective techniques for trauma treatment, application of specific techniques to various modalities, integrated approaches to treating trauma, etc.

AWARDS

1995 Child Advocate Award, Honorable Mention

Child Abuse and Neglect Council of Oakland County

MEMBERSHIPS

American Counseling Association

1980-Present

American Mental Health Counselors Association

1980-Present

Michigan Counseling Association

1980-Present

Michigan Mental Health Counselors Association

1980-Present

International Society for the Study of Dissociation/ Trauma Study Group of Southeast Michigan

1990-Present

International Society for the Study of Dissociation

1991-Present

Michigan Women Psychologists

1995-Present

American Psychological Association

1997-Present

MAJOR FIELD OF INTEREST: Trauma and Dissociative Disorders

PUBLICATIONS:

(1989) Transference, countertransference, and the mental health counselor's pregnancy. Journal of Mental Health Counseling, 11, 155-176.

(1991) Media and MPD. The Advocate, (September), American Mental Health Counselors Association: Alexandria, VA.

(1992) Multiplicity and the family context. The Advocate, (April). American Mental Health Counselors Association: Alexandria, VA.

(1992) Therapist dissociation. The Advocate, (November/December), American Mental Health Counselors Association: Alexandria, VA.

(1993) Ego state disorders: Another form of maladaptive dissociation. The Advocate, (January), American Mental Health Counselors Association: Alexandria, VA.

(1993) Valuable lessons taught by the skeptics. The Advocate, (March), American Mental Health

Counselors Association: Alexandria, VA.

(1993) Working with the male multiple. The Advocate, (April). American Mental Health Counselors Association: Alexandria, VA.

(1994) What does the MPD label mean to you, the therapist? The Advocate, (January), American Mental Health Counselors Association: Alexandria, VA.

(1994) New name, some treatment: MPD becomes Dissociative Identity Disorder, The Advocate, (February), American Mental Health Counselors Association: Alexandria, VA.

(1994) Dream work and MPD, Port I, The Advocate, (March), American Mental Health

Counselors Association: Alexandria, VA.

(1994) Dream work and MPD, Part II. The Advocate, (April), American Mental Health

Counselors Association: Alexandria, VA.

(1994) Controversy over touch in the treatment of Dissociative Identity Disorder (Multiple Personality Disorder, The

Advocate, (May), American Mental Health Counselors Association: Alexandria, VA.

(1994) Contacting reluctant alters. The Advocate, (November/December), American Mental Health Counselors Association: Alexandria, VA.

(1995) Getting the most from conferences and professional workshops. The Advocate, (February), American Mental Health Counselors Association: Alexandria, VA.

(1995) A cautionary tale. The Advocate, (May), American Mental Health Counselors Association: Alexandria, VA

(1[illegible] Humor and healing; or, laugher, the best medicine. The Advocate, (July), American Mental Health Counselors Association: Alexandria VA.

UNPUBLISHED MANUSCRIPTS

(1982) Brain hemisphericity and the unconscious.

(1995) Development of gender differences in traumatic reenactment of childhood sexual abuse.

ROSEMARIE McSWAIN LC No.
Defendant-Appellant.

County Prosecutor
Courthouse
Grand Rapids, MI 49503
Tx: (517) 224-5260; Fax: (517) 224-5254

Jeanice Daghar Margosian (P35933)
Attorney for Defendant-Appellant
3300 Washtenaw, Ste. 290
P.O. Box 2016
Ann Arbor, MI 48106
Tx: (313) 781-5516; Fax: (313) 781-6482

AFFIDAVIT OF THOMAS PARKER, JD

NOW COMES the undersigned affiant, being sworn, and states as follows:

1. I am an attorney in the State of Michigan, practicing in good standing. I have been a public defender in Kent County for approximately 23 years.

2. I represented Rose Marie McSwain in the murder case which is the basis for the motion pursuant to MCR 6.500 presently before the court. I was appointed after initial arraignment, and continued to represent Ms. McSwain throughout trial and sentencing.

3. As I prepared for trial with my client, I visited her numerous times at the jail. Her demeanor changed, especially during the early part of my representation. Then, she was a docile client. On later occasions, she was resistant to my advice, brazen, and hostile.

4. These causes for these changes in demeanor were not apparent In hindsight, these problems with communication impeded the efforts I made to prepare a theory for trial.

5. Ms. McSwain adamantly denied being guilty of this offense, but did not offer any facts which would have supported a defense theory, such as alibi or self-defense. She simply maintained that she did not do it.

6. She did not participate actively in the trial. Throughout the pretrial preparation and trial, she sometimes seemed detached from the entire process. It was my opinion at the time that she was being uncooperative and would not help herself prepare an effective defense. I did not know why she would behave in this fashion while facing such a grave charge.

7. I am well experienced in handling psychiatric cases or the common types, as schizophrenia, paranoia, or manic-depressive I had never seen, nor handled a client with a multiple-personality disorder of any kind. At the time her personality changes were not recognized by myself as a psychiatric symptom.

FURTHER AFFIANT SAYETH NOT.

s/ Thomas Parker DATE: 7-16-98

Thomas Parker, Public Defender, Kent County

Subscribed and sworn to
before me a notary public

This 16 day of July, 1998

/s/ Shelley L. Wooten

Notary Public My commission expires 9-2-2001

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2006, I submitted my PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO COMPLY WITH THE STATUTE OF LIMITATIONS AND BRIEF IN SUPPORT, and my MOTION FOR APPOINTMENT OF COUNSEL AND EVIDENTIARY HEARING to the Clerk of the Court via first class mail. Also, a copy is submitted to the Respondent, Michael A. Cox, Attorney General, and Laura A. Cook, Assistant Attorney General, on the same date, May 22, 2006, via first class mail.

Date: May 22, 2006 s/ Rosemarie McSwain .

Rosemarie McSwain, #197760
Huron Valley Complex/Women's
3511 Bemis Road
Ypsilanti, MI 48197
Pro Se

No. 06-1920

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Rosemarie McSWAIN, Petitioner-Appellant,
v.
Susan DAVIS, Warden, Respondent-Appellee.

Transcript of Oral Argument (Excerpted)
January 29, 2008

BEFORE: SUHRHEINRICH and ROGERS, Circuit Judges; and BELL, Chief District Judge.

. . .

Ms. Van Cleve [Counsel for Respondent-Appellee Susan Davis]: . . . [T]o have a evidentiary hearing before the District Court on the issue of tolling the statute of limitations or an alternate starting date for the statute of limitations and we would submit that that is not appropriate. It's certainly not appropriate on the issues on the merits that are being raised because there was an evidentiary hearing and extensive evidentiary hearing in the state court that went up on appeal and as a matter of fact the state court judge granted the motion for relief of judgment. The Michigan Court of Appeals reversed that ruling and the Michigan Supreme Court denied.

The Court: He is saying that the hearing should be on the tolling issue.

Ms. Van Cleve. On the tolling issue, that's right and I do take that point, but I think that this court could certainly find that in order to be entitled to a hearing on tolling of the statute of limitations, you have to at lease make a prima facie case. And because this case unfortunately is now before this court, the district court did not make a ruling on those documents that this court can look at those documents and can say there is no prima facie case for either an alternate starting date or for equitable tolling on the basis of mental illness or for actual innocence to excuse the statue of limitations then can therefore affirm what the district court did. At the most, it could be sent back down for the district court to make that determination of whether there is enough there which she submitted to warrant an evidentiary hearing on this because if all you have to do is present a claim that you are mentally ill to get a hearing in District Court, then there is going to be a lot of hearings.

The Court: That's what he is saying the law is basically . . . .

Ms. Van Cleve. He's saying that's the law from the Third Circuit based on a couple of cases is that, but it certainly is not from this circuit and of course . . . .

The Court: You would agree that if it were the law here, we would send it back? . . . .

Ms. Van Cleve. Pardon me? . . . .

The Court: You would agree that if it were the law here, we would send it back? . . . .

Ms. Van Cleve. If it were the law that . . . all you have to do is say I have a mental illness . . . .

The Court. If this court had held . . . .

Ms. Van Cleve. If this court had held that, but it has not.

The Court. . . . My question was, if it had, would you agree that those cases would require remand in this case?

Ms. Van Cleve. I would agree that the cases would require a remand . . . .

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(2)

No. 08-917

In the Supreme Court of the United States

Rosemarie McSwain,

Petitioner,

v.

Susan Davis, Warden,

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION

Michael A. Cox
Attorney General

B. Eric Restuccia
Solicitor General
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Brian O. Neill
Assistant Attorney General

Attorneys for Respondent

QUESTION PRESENTED

Where a State prisoner's habeas petition was dismissed as untimely under the statute of limitations and the Sixth Circuit denied Petitioner's request to remand for a hearing on equitable tolling, was that denial a jurisprudential split among circuits over the level of evidence necessary to warrant remand, or a fact-dependent exercise of discretion.

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OPINIONS BELOW

The opinion of the Sixth Circuit (Pet. App. 1a) is available at 287 F. Appx. 450 (2008). The opinion of the United States District Court of the Eastern District of Michigan, Southern Division (Pet. App. 31a) is not reported in the Federal Supplement, but is available at 2006 U.S. Dist. LEXIS 32286.

JURISDICTION

The judgment of the Sixth Circuit was entered on July 15, 2008. Rehearing en banc was denied October 30, 2008. The petition for a writ of certiorari was filed on January 23, 2009. Jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

Certiorari is not warranted because this case involves a fact-based exercise of discretion rather than a jurisprudential split among circuits. In essence, the Sixth Circuit simply denied a post-dismissal attempt to save a miscalculation in the statute of limitations.

Generally, a petitioner has one year from discovery of a new factual predicate to seek federal habeas review. While post-conviction review of that new claim in the State courts will toll the one-year period, it does not create a new one-year period of limitations. Here, by waiting 364-days after post-conviction review ended to file her habeas petition, Petitioner failed to account for the six months that had passed prior to seeking post-conviction review. Therefore, her petition was dismissed as untimely.

On appeal, Petitioner claimed for the first time that an evidentiary hearing was necessary to demonstrate that mental illness prevented her from complying with the statute of limitations. The United State Court of Appeals for the Sixth Circuit refused, noting Petitioner was represented by counsel when the petition was filed and that Petitioner failed to identify any support in the record for her post-dismissal claim, or even allege how her mental illness would have prevented compliance with the statute of limitations.

It is this refusal to remand, that Petitioner now seeks a writ of certiorari to challenge, arguing that the Sixth Circuit's unpublished opinion imposes a higher burden on petitioners to justify remand on equitable-tolling claims than the Third and Ninth Circuits.

Contrary to this claim, there is no jurisprudential split among the circuits. The two cases primarily relied on by Petitioner are factually distinct and recognize a court's inherent discretion to determine whether equitable tolling is justified. The Sixth Circuit's denial of remand was simply a fact-dependent exercise of that discretion.

Moreover, habeas review of a state-court adjudication is limited to the holding of this Court, and this Court has never expressly recognized the existence of equitable tolling in § 2254 cases.

STATEMENT

In 1988, following a jury trial in Kent County, Michigan, Petitioner Rosemarie McSwain was convicted of first-degree premeditated murder and sentenced to life imprisonment.[1] Her appeal was denied by the Michigan Court of Appeals in 1990 and by the Michigan Supreme Court in 1991.

Almost ten years after her conviction, Petitioner filed a motion for post-conviction review based on newly discovered evidence; specifically, the fact she had recently been diagnosed with Dissociative Identity Disorder ("DID").[2]

Following an evidentiary hearing, the trial court found a substantial likelihood that Petitioner would have been declared incompetent to stand trial or a reasonable likelihood that the jury would have decided the case differently. Accordingly, the trial court ruled that Petitioner was entitled to a new trial.

The Michigan Court of Appeals reversed, finding that although Petitioner's expert witnesses offered significant testimony regarding her current mental condition, her experts could only speculate as

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[1] Essentially, Petitioner was working as a prostitute. She threatened to kill the victim for wasting her time because he would not pay. She pulled a firearm on him, shot him, and later confessed telling cellmates she did not mean to actually kill him. (See Pet. App. 43a-45a).

[2] Petitioner raised numerous claims on direct review, none of which alleged mental illness. (See Pet. App. 45a).

to her condition at the time of the offense or trial.[3] As stated by the Michigan Court of Appeals:

> [W]e are left with the firm and definite impression that, to the extent that the trial court actually made a decision that McSwain suffered from dissociative identity disorder at the time of her trial, that decision was a mistake. Simply put, there was no direct evidence on which the trial court could have based such a decision, and the opinion testimony of McSwain's experts was at best speculative and at worst after-the-fact extrapolation. [Pet. App. 83a.]

Petitioner subsequently filed an application for leave to appeal in the Michigan Supreme Court, which was denied on September 16, 2004 (Pet. App. 41a), thus ending post-conviction review.

On September 15, 2005, one day less than a full year later, Petitioner's attorney filed her application for a writ of habeas corpus.[4]

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[3] Petitioner's trial attorney testified that he had significant experience defending clients with mental health issues and that Petitioner did not appear to be suffering from a mental illness. (Pet. App. 49a-50a). Further, the state's expert interviewed Petitioner three times, reviewed the police reports, trial transcripts, and her psychiatric records, finding no indication of DID. (See Pet. App. 59a-62a). Petitioner's experts did not review the trial transcripts or police reports – yet gave opinions as to her mental condition at the time of trial. (Pet. App. 20a).

[4] While the petition was signed by Petitioner on September 14, 2005, it was filed by counsel on September 15, 2005. Petitioner repeatedly states that her petition was filed September 14, 2005, but offers no argument for application of the mailbox rule.

Under 28 U.S.C. § 2244(d)(1)(D), a petition seeking federal habeas relief from a state conviction must be filed within one year of the date on which the factual predicate of the claim could have been discovered through the exercise of due diligence. Here, the latest date that Petitioner could be said to have discovered the factual predicate for her mental-incompetence claim was February 5, 1998.[5] While post-conviction review tolls the statute of limitations under § 2244(d)(2), it does not reset the statute or create a new date from which the one-year period begins to run.[6] Thus, Petitioner had "less than six months from the conclusion of her state post conviction proceedings on September 16, 2004, to file her § 2254 petition." (Pet. App. 9a).

Despite the fact that her claims had been fully developed and exhausted in the State courts, Petitioner waited 364-days, until September 15, 2005, to file her habeas petition. (Pet. App. 120a). By waiting so long, Petitioner failed to account for any time having elapsed under the statute of limitations prior to seeking post-conviction review. The petition was dismissed by the district court as untimely.

The Sixth Circuit granted Petitioner's request for a certificate of appealability and appointed counsel. After reviewing the briefs and hearing oral argument, the Sixth Circuit agreed that the petition was untimely and barred by the statute of limitations.

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[5] Petitioner was diagnosed with DID on August 15, 1997. That diagnosis was confirmed on February 5, 1998. The court of appeals gave Petitioner the benefit of the later date of February 5, 1998 in calculating the limitations period. (Pet. App. 9a)

[6] See *Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003); *Searcy v. Carter*, 246 F.3d 515, 519 (6th Cir. 2001)

Petitioner argued for the first time on appeal to the Sixth Circuit that she was entitled to an evidentiary hearing on whether her mental illness impaired her ability to comply with the statute of limitations. The Sixth Circuit declined to remand, noting that the petition was filed by counsel and finding nothing in the record – even allegations – to support Petitioner's post-dismissal claim. (Pet. App. 14a-15a). It is this denial of remand for a second evidentiary hearing that Petitioner now seeks a writ of certiorari to challenge.

Petitioner argues that the Sixth Circuit's unpublished opinion sets forth a different burden of proof for entitlement to remand for a hearing on equitable tolling than the Third and Ninth Circuits. In support of this claim, Petitioner relies on two cases: *Nara v. Frank*[7] and *Laws v. Lamarque*.[8] As detailed herein, this case does not involve a jurisprudential split with *Nara* and *Laws*. Indeed, both cases were cited by the Sixth Circuit as support for its decision. Contrary to Petitioner's claims, this case involves nothing more than a fact-bound determination involving the proper exercise of discretion.

Moreover, habeas review under 28 U.S.C. § 2254(d) is limited to clearly established precedent of this Court, and this Court has never held that equitable tolling applies to § 2254 cases.[9] Nor is there any reason to expand the already ample tolling provisions expressly drafted into the statute of limitations by Congress.[10]

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[7] *Nara v. Frank*, 264 F.3d 310, 320 (3rd Cir. 2001).
[8] *Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir. 2003).
[9] See *Lawrence v. Florida*, 549 U.S. 327, 336 (2007).
[10] See 28 U.S.C. § 2244(d)(1)(B)-(D) and § 2244(d)(2).

While the existence of equitable tolling is a condition precedent to remand for a hearing on whether equitable tolling is warranted, it is unnecessary to reach that issue in this case. Even assuming equitable tolling, this case simply involves the exercise of discretion over a particular set of facts.

REASONS FOR DENYING CERTIORARI

Petitioner filed her petition for federal habeas relief after the statute of limitations expired. On appeal she argued for the first time that she was entitled to a second evidentiary hearing, this time on whether her mental illness prevented compliance with the statute of limitations. The Sixth Circuit denied her claim, noting the petition was filed by counsel, that Petitioner had never alleged that her illness affected her ability to comply with filing requirements until after her petition was dismissed, and that Petitioner failed to offer any explanation as to how her mental illness affected her or her attorney's ability to file her petition sooner than 364-days after post-conviction review ended.

Petitioner now seeks a writ of certiorari to challenge the denial of remand, arguing that the Sixth Circuit's unpublished opinion represents a jurisprudential split among circuits over the amount of evidence a petitioner must present to be entitled to remand. Contrary to this claim, this case simply involves the exercise of discretion over a specific factual record and brings finality to a twenty-year-old conviction.

The petition for a writ of certiorari should be denied because (1) the Sixth Circuit correctly concluded that Petitioner is not entitled to equitable tolling; (2) that decision was a fact-dependent exercise of discretion rather than a jurisprudential split; and (3) this Court has never held that equitable tolling applies to habeas review of state-court adjudications.

1. The record does not support Petitioner's post-dismissal claim of entitlement to equitable tolling.

In *Pace v. DiGuglielmo*, this Court explained that a litigant seeking equitable tolling bears the burden of establishing "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way."[11] Although this Court has never squarely held that equitable tolling applies to § 2254 cases,[12] Petitioner correctly asserts that all of the federal appellate circuits have done so.[13] In fact, the Sixth Circuit is one of the more generous in its application, having identified five factors to consider in determining whether equitable tolling is appropriate:

1. Notice of the filing requirement;
2. Constructive knowledge of the filing requirement;
3. Diligence in pursuing one's rights;
4. Absence of prejudice to the respondent; and
5. Reasonableness in remaining ignorant.[14]

In this case, Petitioner claimed for the first time after her petition was dismissed that she was entitled to equitable tolling because her mental illness

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[11] *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

[12] *Pace*, 544 U.S. at 418, fn 8 ("we assume without deciding its application for purposes of this case"). See also *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) ("We have not decided whether § 2244(d) allows for equitable tolling").

[13] See Petition for Writ of Certiorari, footnote 1 citing cases.

[14] See *Barry v. Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008); *Keenan v. Bagley*, 400 F.3d 417, 421 (6th Cir. 2005).

prevented her from complying with the statute of limitations.[15]

The Sixth Circuit denied this claim, finding nothing in the record to support a causal connection between her mental illness and her ability to file a timely petition. (Pet. App. 12a). "Indeed, the record evidence indicates McSwain was able to pursue both direct and collateral challenges to her conviction in the state courts notwithstanding her mental illness" and "McSwain was also represented by an attorney at the time she filed her federal habeas petition, as evidenced by the fact that her federal habeas petition was prepared and signed by an attorney." (Pet. App. 12a-13a). In fact, as the Sixth Circuit explained, Petitioner's pre-appeal position was that her petition was timely:

> McSwain has not alleged any facts that would suggest that her mental illness prevented her from timely filing her habeas petition. She indicated in her untimely response to the motion to dismiss that she believed her petition was timely because it was filed within one year of the conclusion of her state post-conviction proceedings. She did not assert that she was prevented from filing it in a timely manner because of her mental illness. [Pet. App. 13a.]

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[15] In her *strikingly* well-drafted *pro se* response to the motion to dismiss, Petitioner flatly asserted she "likely suffers periods of incompetency which would effect her ability to file a timely habeas petition." (Pet. App. 133a-137a).

In essence, Petitioner's claim is an attempt to save a miscalculation in the statute of limitations rather than an actual impediment that prevented the timely filing of the petition. Petitioner still fails to allege any specific connection between her mental illness,[16] and the fact her attorney waited 364 days to file the petition.[17] Nor does Petitioner explain why she never alleged that her mental illness impaired her ability to comply with the statute of limitations until after dismissal.[18]

Even assuming equitable tolling applies to § 2254 cases, the Sixth Circuit correctly denied this claim.

2. The two cases Petitioner relies on represent courts exercising discretion over different facts, not a jurisprudential split.

For the first time on appeal, Petitioner requested an evidentiary hearing on whether her mental illness prevented compliance with the statute

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[16] The two cases Petitioner primarily relies on in support of her petition for certiorari both recognize mental incompetence alone is not a per se reason to toll the statute of limitations. Rather, the petitioner must show some causal connection between the alleged incompetence and ability to file a timely petition. See *Nara v. Frank*, 264 F.3d 310, 320 (3rd Cir. 2001) and *Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir. 2003).

[17] "[A] petitioner's reliance on the unreasonable and incorrect advice of his or her attorney is not a ground for equitable tolling." *Allen v. Yukins*, 366 F.3d 396, 403 (6th Cir. 2004), citing *Jurado v. Burt*, 337 F.3d 638, 644-45 (6th Cir.2003).

[18] In fact, contrary to such a claim, Petitioner's own expert witness acknowledged at the state court evidentiary hearing that persons with *did* can be competent to stand trial and that Petitioner was currently competent to stand trial. (Pet. App. 21a)

of limitations. The Sixth Circuit declined to remand because "McSwain has not alleged any facts, which, if true, would show that her mental illness prevented her from timely filing her habeas petition once she became aware of her DID diagnosis[.]" (Pet. App. 15a). While Petitioner asserted in her late response to the motion to dismiss that she "likely suffers periods of incompetency which would effect her ability to file a timely habeas petition," the Sixth Circuit found this generalized and unsupported assertion insufficient. (Pet. App. 14a-15a). The Sixth Circuit further noted the motion for an evidentiary hearing filed with Petitioner's late response was for the purpose of presenting evidence on competence to stand trial, not ability to comply with the statute of limitations. (Pet. App. 15a). Thus, the Sixth Circuit concluded "McSwain's suggestion, raised for the first time on appeal, that she might be able to produce some evidence that her mental illness prevented her from timely filing her habeas petition lacks a sufficient factual basis to warrant an evidentiary hearing." (Pet. App. 15a).

It is this specific ruling that Petitioner now seeks a writ of certiorari to challenge.[19] Petitioner claims the Sixth Circuit's conclusion represents a jurisprudential split arising from the Third and Ninth Circuits as to the burden of proof necessary to warrant remand for a hearing. In support, Petitioner primarily relies on two cases: *Nara v. Frank*,[20] and *Laws v. Lamarque*.[21] Both are factually distinct.

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[19] Petitioner does not appear to challenge the Sixth Circuit's ruling that she is not entitled to equitable tolling on the basis of actual innocence or denial of remand on that claim. (Pet. App. 16a-26a).

[20] *Nara*, 264 F.3d at 312.

[21] *Laws*, 351 F.3d at 921.

In *Nara*, the petitioner was severely suicidal and hospitalized numerous times, once for approximately 16 months.[22] He filed several motions for post-conviction review in the state courts challenging the validity of his guilty plea based on mental incompetence.[23] He then filed a petition seeking federal habeas relief which the district court dismissed as untimely.

On appeal, the Third Circuit remanded for an evidentiary hearing, based on the petitioner's assertions that his mental impairment and ineffective assistance of counsel prevented compliance with the statue of limitations.[24] Regarding the mental-impairment aspect, the Third Circuit found that evidence of an ongoing incompetency warranted remand for an evidentiary hearing:

> In Nara's case, there was no evidence in the record that Nara's current mental status affected his ability to present his habeas petition. However, because Nara originally filed his habeas petition pro se, and because he has presented evidence of ongoing, if not consecutive, periods of

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[22] *Nara*, 264 F.3d at 312.

[23] *Nara*, 264 F.3d at 313.

[24] The petitioner in *Nara* did not seek remand for a hearing solely on alleged mental impairment. He also claimed "that his attorney failed to inform him when the Pennsylvania Supreme Court denied review of his motion to withdraw his guilty plea; that his attorney refused to remove herself as appointed counsel after the Pennsylvania Supreme Court decision, thus preventing him from 'moving his case forward;' that his attorney led him to believe that she was going to file the federal habeas petition on his behalf; and that his attorney told him that there were no time constraints for filing a petition." *Nara*, 264 F.3d at 320.

> mental incompetency, an evidentiary hearing is warranted in order to develop the record.[25]

The petitioner in *Laws* was convicted in 1993 and filed a State habeas petition in 2000. He alleged in that petition that the delay "was attributable to psychiatric 'medication which deprived [Laws] of any kind of consciousness.'"[26] While his subsequent federal habeas petition did not raise the incompetence claim, he argued in response to a motion to dismiss that his mental impairment prevented compliance with the statute of limitations.[27]

The district court denied equitable tolling, finding that Laws had failed to show his mental impairment made it "impossible" to comply with the statute of limitations. The Ninth Circuit reversed because the district court had denied the petitioner an opportunity to develop his allegations:

> On this record, the district court erred in granting judgment against Laws based upon the papers then before it. It is enough that Laws "alleged mental incompetency" . . . in a verified pleading. . . The district court should then have allowed discovery or ordered expansion of the factual record.[28]

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[25] *Nara*, 264 F.3d at 320.

[26] *Laws*, 351 F.3d at 921.

[27] "The memorandum, evidently prepared by another inmate, argued that Laws's 'psychotic dysfunction' precluded his timely filing. Laws also contended he was able to file his federal and state petitions in 2000-2002 only with the help of a jailhouse lawyer." *Laws*, 351 F.3d at 922.

[28] *Laws*, 351 F.3d at 924 (citation omitted).

What distinguishes this case from *Nara* and *Laws* is the specific set of facts before the reviewing courts. The petitioner in *Nara* was repeatedly hospitalized for extended periods of time. The petitioner in *Laws* had repeatedly alleged that his mental illness impaired his ability to comply with filing requirements. Here, as the Sixth Circuit noted, it is neither obvious how Petitioner's mental illness impaired her or her attorney's ability to comply with the statute of limitations, nor did Petitioner make any such allegation until after her petition was dismissed.

The Sixth Circuit was clearly aware of *Nara* and *Laws*; both cases are cited in its opinion, not as contrary authority, but as support for the proposition that the mere existence of a mental illness does not automatically justify equitable tolling. (Pet. App. 12a). Furthermore, both *Nara* and *Laws* recognize that granting remand to develop the record on equitable tolling is a matter of discretion rather than a specific set of standards or benchmarks.[29] And that is precisely what happened in this case – an exercise in discretion on a specific set of facts, not a jurisprudential split over burdens of proof.

The Sixth Circuit correctly regarded Petitioner's equitable-tolling claim as a post-dismissal attempt to save a miscalculation in the statute of limitations and brought finality to a twenty-year old conviction.

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[29] See *Nara*, 264 F.3d at 320 ("courts have discretion to apply principles of equity"); *Laws*, 351 F.3d at 924 ("Of course, a petitioner's statement, even if sworn, need not convince a court that equitable tolling is justified should countervailing evidence be introduced").

3. Moreover, this Court has never held that equitable tolling applies to § 2254 cases, let alone recognized entitlement to remand based on unsupported post-dismissal assertions.

Federal habeas review of a state conviction is limited to the holdings of this Court.[30] On at least two occasions, this Court has expressly noted that it has never held equitable tolling applies to § 2254 cases.[31] While that issue is not squarely presented by Petitioner, it is a condition precedent to her claim for remand; for if there is no entitlement to equitable tolling there would be no entitlement to remand on the issue of equitable tolling.[32]

As drafted by Congress, 28 U.S.C. § 2244(d) already sets forth four ways in which the statute of limitations is effectively tolled:

- First, under subsection (d)(1)(B), the one-year statute of limitations does not start until any unconstitutional impediment created by state action is removed.

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[30] 28 U.S.C. § 2254(d)(1); See also *Knowles v. Mirzayance*, __ U.S. __; 129 S. Ct. 1411, 1419 (2009); *Wright v. Van Patten*, __ U. S. __; 128 S. Ct. 743, 747 (2008); *Carey v. Musladin*, 549 U.S. 70, 74 (2006).

[31] *Pace*, 544 U.S. at 418; *Lawrence*, 549 U.S. at 336.

[32] As explained in *Williams v. Taylor*, Congress intended to codify the existing rule that habeas relief is not available upon a rule of law not clearly established at the time the state conviction became final. *Williams v. Taylor*, 529 U.S. 362, 380 (2000). Here, equitable tolling was not recognized at the time Petitioner's conviction became final or at the time post-conviction review ended.

- Second, under subsection (d)(1)(C), petitioners get a new one-year period for claims based on newly recognized retroactive constitutional rights.

- Third, subsection (d)(1)(D) creates a new one-year period from the date a petitioner could have discovered a new factual predicate.

- Finally, subsection (d)(2) expressly tolls the statute of limitations during post-conviction review in the state courts.

Congress could have included a blanket tolling provision.[33] Instead, Congress drafted a detailed and specific set of circumstances under which the statute of limitations would toll.[34] If the purpose of the statute of limitations is to bring finality to state convictions,[35]

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[33] "Congress, the Rule writers, and the courts have developed more complex procedural principles that regularize and thereby narrow the discretion that individual judges can freely exercise." *Felker v. Turpin*, 518 U.S. 651, 664 (1996).

[34] As this Court explained when considering the Quiet Title Act, "[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute" and "by providing that the statute of limitations will not begin to run until the plaintiff 'knew or should have known of the claim of the United States,' [the Act] has already effectively allowed for equitable tolling." *United States v. Beggerly*, 524 U.S. 38, 48 (1998). A similar provision appears in § 2244(d). See also *United States v. Brockamp*, 519 U.S. 347, 352 (U.S. 1997).

[35] The statute of limitations "serves the well-recognized interest in the finality of state court judgments," encouraging litigants to "exhaust all state remedies and then to file their federal habeas petitions as soon as possible." *Duncan v. Walker*, 533 U.S. 167, 179, 181 (2001).

there is no reason to expand those circumstances to include general equitable tolling.[36]

Here, operation of the statute of limitations as drafted by Congress allowed Petitioner ample time to present her claims. The statute did not begin running until she discovered the factual predicate for her claim ten years after being convicted, § 2244(d)(1)(D), and the statute was tolled for five more years during post-conviction review, § 2244(d)(2). After exhausting her new claim in the State courts, Petitioner still had six months to file her habeas petition. Now, despite failing to offer any explanation as to how her mental illness prevented her or her attorney from filing already developed claims within that time period, Petitioner seeks equitable tolling for an additional six months, which is what this case is really about – a post-dismissal attempt to rescue a miscalculation in the statute of limitations, not a jurisprudential split among the circuits requiring resolution by this Court.

If certiorari were to be granted, it would really be on the issue of whether equitable tolling applies to § 2254 cases, not on the degree of discretion appellate courts have over whether to grant remand. However, given that the Sixth Circuit's decision in this case is so tied to an exercise of discretion over a specific set of facts, Respondent requests that certiorari simply be denied.

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[36] While similar to § 2244(d), the statute of limitations for habeas review of federal custody is not identical. See 28 U.S.C. § 2255(f). Nor need it serve "principles of comity, finality, and federalism." *Duncan*, 533 U.S. at 178, quoting *Williams*, 529 U.S. at 436.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted

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Dated: May, 2009

(3)

No. 08-917

IN THE

Supreme Court of the United States

ROSEMARIE MCSWAIN,

Petitioner,

v.

MILLICENT WARREN, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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ARGUMENT

As the Respondent (the "State") candidly admitted at oral argument in the court of appeals below, under the Third Circuit's decision in *Nara v. Frank*, 264 F.3d 310 (3d Cir. 2001), *rev'd in part on other grounds by Carey v. Saffold*, 536 U.S. 214 (2002), and the Ninth Circuit's decision in *Laws v. Lamarque*, 351 F.3d 919 (9th Cir. 2003), Ms. McSwain would be entitled to an evidentiary hearing, but in the Sixth Circuit she is not. *See* Pet. App. 237a-238a (the State agreeing that *Nara* and *Laws* "would require remand in this case"); *see also* Pet. 14. The State now attempts to walk away from this concession.

The State's concession before the court below was correct. The issue here is whether a habeas petitioner who has presented uncontested credible evidence of her mental illness is entitled to an evidentiary hearing on the issue of causation—that is, whether her mental illness prevented compliance with the one-year filing deadline of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d). The Third and Ninth Circuits recognize that a showing of mental illness during the period in question is sufficient, without more, to trigger the evidentiary hearing requirement. *Nara*, 264 F.3d at 320 (requiring an evidentiary hearing where "there was *no evidence in the record* that Nara's current mental status *affected* his ability to present his habeas petition") (emphases added); *Laws*, 351 F.3d at 924 (requiring an evidentiary hearing where the petitioner merely "'*alleged* mental

incompetency' in a verified pleading") (emphasis added; citation omitted). The Sixth Circuit, by contrast, denied an evidentiary hearing because Ms. McSwain could not, at the stage of seeking a hearing, establish causation—the very issue upon which the Third and Ninth Circuits require an evidentiary hearing. *See* Pet. App. 15a ("McSwain's speculation about the impact of her mental illness on her ability to timely file her habeas petition is not sufficient to warrant an evidentiary hearing."). This issue, moreover, is particularly important to protect this uniquely vulnerable category of petitioners, who, because of their debilitating mental illnesses, often are incapable of defending their own interests or assisting others in defending them.

The State's attempt to minimize this clear conflict, and its other arguments, are entirely without merit.

1. The State offers three erroneous bases for distinguishing *Nara* and *Laws*. *First*, the State appears to assert that this claim is not properly before this Court because Ms. McSwain did not raise this issue in the district court. *See, e.g.*, Opp. Br. 10, 16. But Ms. McSwain raised her mental illness in the district court, *see* Pet. App. 135a; the district court squarely considered this issue, *see id.* 37a; and, most importantly, it was the *principal issue* addressed in the Sixth Circuit's ruling below, *id.* 9a-16a. The State's suggestion to the contrary is, quite simply, baffling.

Second, the State attacks the quality of Ms. McSwain's evidence of mental illness. *See* Opp. Br.

16. But as the Sixth Circuit determined, "[t]he record contains substantial evidence to support McSwain's assertion that she suffers from a mental illness," Pet. App. 12a, including the diagnoses of *multiple* mental health professionals, all of whom concluded that she suffered from a severe case of Dissociative Identity Disorder ("DID"), *see id.* 155a-231a. To the extent that the State's real claim is that Ms. McSwain failed to demonstrate that her concededly severe mental illness *caused* her to miss the filing deadline, it is precisely this issue of "causation" that has divided the circuits and upon which Ms. McSwain seeks certiorari—the Third and Ninth Circuits have held that an evidentiary hearing is required to determine causation, and the Sixth Circuit has held the opposite. Thus, this is no basis at all for distinguishing *Nara* and *Laws* from the present case.

Finally, the State contends that *Nara* and *Laws* are somehow distinguishable because "equitable tolling is a matter of discretion." Opp. Br. 16. That is, of course, entirely irrelevant. Whether or not a court abuses its discretion in applying or refusing to apply equitable tolling, it does not negate the threshold right to an evidentiary hearing to inform the court's exercise of discretion. *Nara* and *Laws* make clear that where, as here, a petitioner makes a credible allegation of mental illness, then an evidentiary hearing is *required* to determine whether that mental illness caused the untimely filing. That is precisely why the Third and Ninth Circuits *reversed* the decisions of district courts that, on materially indistinguishable facts, refused to conduct

evidentiary hearings on the causation question. *Nara*, 264 F.3d at 320; *Laws*, 351 F.3d at 924-25.

In short, as the State previously conceded, the holding in this case is in direct conflict with *Nara* and *Laws* on an important question of federal law—whether a mentally ill habeas petitioner is entitled to an evidentiary hearing to determine whether her mental illness affected her ability to meet AEDPA's one-year period of limitations.

2. The State also asserts that this Court should deny certiorari because this Court has yet to resolve the threshold question whether equitable tolling is *ever* authorized under AEDPA. *See* Opp. Br. 10, 17; *see Lawrence v. Florida*, 549 U.S. 327, 336 (2007) ("assum[ing] without deciding that" "§ 2244(d) allows for equitable tolling") (citation omitted); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 n.8 (2005) (same). This, however, is no reason at all to deny certiorari and, if anything, favors a grant. The circuits have uniformly ruled that equitable tolling *does* apply to AEDPA. *See* Pet. 9 n.1; Opp. Br. 10. And while one judge has questioned this uniform rule, *see Solomon v. United States*, 467 F.3d 928, 936 (6th Cir. 2006) (Griffin, J., dissenting), the likelihood of a split developing is remote to say the least. Thus, the *only* vehicle for resolving this important threshold question is a case, like this one, that presents the question whether equitable tolling is appropriate (assuming it applies at all). *See also, e.g.*, Brief for California, *et al.*, as *Amici Curiae*, *Belleque v. Kephart*, No. 06-1015 (U.S. Feb. 23, 2007), 2007 WL

604974 (asking that the Court grant certiorari and hold that equitable tolling does not apply under AEDPA).[1]

3. Finally, the State argues that, under the facts of this case, Ms. McSwain should not be entitled to equitable tolling, because the facts do not establish that Ms. McSwain's mental illness *caused* her to miss AEDPA's one-year filing deadline. *See* Opp. Br. 10-12. This is, again, the question of "causation" that divides the circuits: The Third and Ninth Circuits have held that where, as here, a petitioner makes a credible allegation of mental illness, an evidentiary hearing is required to assess whether that mental illness affected the petitioner's ability to meet AEDPA's one-year limitations period. The Sixth Circuit, in contrast, has reached the opposite result,

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[1] Although somewhat unclear, the State may be suggesting that this Court can *never* grant certiorari on *any* equitable tolling question because it is not "clearly established" law under 28 U.S.C. § 2254(d) that equitable tolling *ever* applies under AEDPA. Opp. Br. 7 (arguing that "habeas review under 28 U.S.C. § 2254(d) is limited to clearly established precedent of this Court, and this Court has never held that equitable tolling applies to § 2254 cases"). Under this Catch-22, this Court could *never* resolve the threshold question whether equitable tolling applies, and, if so, whether it applies in a given case. Likewise, under this argument, the myriad lower court decisions allowing equitable tolling under AEDPA would all be wrong, since they would have done so even though (in the State's view) the question whether equitable tolling applies at all is not and never could be the "clearly established precedent of this Court." Needless to say, the State offers no support for this puzzling assertion.

denying an evidentiary hearing and thus denying an opportunity for further factual inquiry into the causation issue.

Similarly, the State's erroneous assertion that Ms. McSwain "was . . . represented by an attorney at the time she filed her federal habeas petition" (Opp. Br. 11 (internal quotation marks omitted)) offers no ground against Ms. McSwain's request for this Court's review. Ms. McSwain vigorously disputes that she was represented by counsel in the federal habeas proceedings.[2] But if the State has a bona fide dispute here, this, too, along with any questions concerning causation, are for the evidentiary hearing which she was wrongly denied below, but would have received in the Third or Ninth Circuits.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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[2] Although Ms. McSwain's standard form habeas petition was signed by attorney John L. Grace III (Pet. App. 129a), in two subsequent letters to the Magistrate Judge below, Mr. Grace insisted that Ms. McSwain's petition was filed "In Pro Per" (*id.* 145a), and that he "[did] not represent [Ms. McSwain] in this matter." *Id.*; *see id.* 147a. Other than that standard form, and until she was given appointed counsel in the Sixth Circuit, Ms. McSwain acted *pro se* throughout the proceedings below—including, critically, when she filed her response to the State's motion to dismiss in the district court. *Id.* 133a-235a, 4a.

Respectfully submitted,

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